

No. 98-1828-CFX Title: Vermont Agency of Natural Resources, Petitioner
v.
United States, ex rel. Jonathan Stevens

Docketed: Court: United States Court of Appeals for
May 12, 1999 the Second Circuit

Entry	Date	Proceedings and Orders
May 12	1999	Petition for writ of certiorari filed. (Response due June 11, 1999)
May 26	1999	Brief of respondent United States filed.
May 27	1999	Brief of respondent Jonathan Stevens in opposition filed.
Jun 8	1999	DISTRIBUTED. June 24, 1999
Jun 10	1999	Brief amici curiae of New York, et al. filed.
Jun 10	1999	Brief amici curiae of City of New York, et al. filed.
Jun 24	1999	Petition GRANTED. SET FOR ARGUMENT November 29, 1999. *****
Jul 23	1999	Order extending time to file petitioners' brief on the merits to and including September 3, 1999.
Aug 24	1999	Brief amici curiae of City of New York, et al. filed.
Sep 3	1999	Brief amici curiae of Alabama Medicaid Agency, et al. filed.
Sep 3	1999	Joint appendix filed.
Sep 3	1999	Brief of petitioner Vermont Agency of Natural Resources filed.
Sep 3	1999	Brief amici curiae of National Governors' Association, et al. filed.
Sep 3	1999	Brief amici curiae of Regents of the University of Minnesota, et al. filed.
Sep 3	1999	Brief amici curiae of New York, et al. filed.
Sep 3	1999	Brief amici curiae of Orleans Parish School Board, et al. filed.
Sep 10	1999	Order extending time to file brief of respondents to and including October 22, 1999.
Sep 17	1999	Order extending time to file government's brief on the merits to and including October 22, 1999.
Oct 6	1999	CIRCULATED.
Oct 20	1999	Motion of Solicitor General for divided argument filed.
Oct 20	1999	Brief amicus curiae of National WhistleBlower Center filed.
Oct 22	1999	Record filed and returned on November 5, 1999.
Oct 22	1999	Brief of respondent Jonathan Stevens filed.
Oct 22	1999	LODGING consisting of twelve copies of the Relator's Written Disclosure of Material Evidence and Information submitted by counsel for the respondent and distributed.
Oct 22	1999	Brief amicus curiae of Taxpayers Against Fraud filed.
Oct 22	1999	Brief of United States filed.
Nov 15	1999	Motion of Solicitor General for divided argument GRANTED.
Nov 18	1999	Reply brief of petitioner State of Vermont Agency of Natural Resources filed.
Nov 19	1999	The parties are directed to file supplemental briefs addressing the following question: "Does a private person have standing under Article III to litigate claims of fraud upon the government?" Briefs are to be

Entry	Date	Proceedings and Orders
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filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 30, 1999. Twenty copies of the briefs prepared under Rule 33.2 may be filed initially in order to meet the November 30 filing date. Rule 29.2 does not apply. Forty copies of the briefs prepared under Rule 33.1 are to be filed as soon as possible thereafter.
ARGUED.

Nov 29 1999

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No. 98-__

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In The
Supreme Court of the United States

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL.
JONATHAN STEVENS,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State is a "person" subject to liability under 31 U.S.C. § 3729(a) of the False Claims Act?
2. Whether the Eleventh Amendment precludes a private relator from commencing and prosecuting a False Claims Act suit against an unconsenting State?

PARTIES TO THE PROCEEDING BELOW

The parties in the United States Court of Appeals for the Second Circuit were the plaintiff, Jonathan Stevens, a *qui tam* relator under the False Claims Act, and the Defendant State of Vermont Agency of Natural Resources. The United States, while listed as a plaintiff, did not participate as a plaintiff before either the district court or the court of appeals. The United States intervened in the court of appeals to defend the False Claims Act's constitutionality as applied to the States and address Vermont's contention that the FCA does not allow for suits to be brought against the States.

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PETITION FOR A WRIT OF CERTIORARI

The State of Vermont petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, which rejected Vermont's arguments that: (1) States are not "persons" subject to liability under the False Claims Act; and (2) the Eleventh Amendment precludes private parties from commencing and prosecuting *qui tam* actions under the False Claims Act against an unconsenting state.

OPINIONS BELOW

The court of appeals' opinion (App. 1-85) is published as *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998). The decision of the United States District Court for the District of Vermont (App. 86-87) is not published.

JURISDICTION

The court of appeals' decision was entered on December 7, 1998. Rehearing and rehearing *en banc* were both denied on April 13, 1999. App. 89-90. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733 is reproduced in the appendix, App. 91-127.

STATEMENT OF THE CASE

1. Vermont administers and enforces federal and state environmental protection laws designed to protect the public health and safety. These laws include the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, and state laws that implement these federal statutes, *see, e.g.*, Vt. Stat. Ann. tit. 10, chs. 47, 48, and 56. These comprehensive environmental and public health protection statutes rely on the States' police powers and the traditional role of the States in our federalist system. *See, e.g.*, 33 U.S.C. § 1251(b) (Clean Water Act) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the [Environmental Protection Agency] in the exercise of [its] authority under this [Act]. . . ."). Vermont administers and enforces the laws at issue in partnership with the federal government. *See, e.g.*, 33 U.S.C. §§ 1329(a) & (b) (governors of each State delegated by the United States to develop non-point source water pollution prevention programs). This partnership is facilitated through categorical grants provided

by the EPA to Vermont under the Clean Water and Safe Drinking Water Acts. In sum, Vermont and the EPA work closely together to protect and improve public health and the environment.

The plaintiff alleges that Vermont's use of pre-approved percentages to account for staff time spent working under EPA grants violated certain accounting procedures. He asserts that Vermont's submissions to EPA that allegedly did not comply with these accounting rules constitute false claims to the federal government. The plaintiff does not allege, nor could he, that Vermont is not doing its job under the various federal programs it administers and enforces. In fact, the EPA has no complaint with Vermont's administration of these grants. This dispute is, purely and simply, about an accounting principle.

2. On May 26, 1995, Stevens filed suit, under seal, against the State of Vermont under the *qui tam* provisions of the False Claims Act. 31 U.S.C. § 3730(b), App. 94-95. He seeks 25 percent of treble damages and civil penalties arising out of the allegedly false claims Vermont made to EPA, plus attorneys fees, and costs. The district court putatively exercised jurisdiction pursuant to 31 U.S.C. §§ 3729, 3730(b), 3732(a) and 28 U.S.C. § 1331. On June 27, 1996, after having conducted the diligent investigation required by 31 U.S.C. § 3730(a), App. 94, the federal government gave notice of its election not to intervene in this matter. On July 30, 1996, the district court lifted the seal.

On November 7, 1996, Stevens, exercising his statutory right under the FCA, served the complaint on the

State of Vermont, and began prosecuting, on his own behalf and nominally on behalf of the United States, the case he commenced. 31 U.S.C. § 3730(c)(3), App. 97. Vermont moved to dismiss the complaint on the grounds that the district court lacks jurisdiction to entertain Stevens' suit because States are not "persons" subject to liability under the FCA, and the FCA's *qui tam* provisions violate the Eleventh Amendment as applied to state defendants. On May 9, 1997, the district court denied Vermont's motion to dismiss, App. 86-89, and set the matter for trial in July of 1997. On June 10, 1997, the district court declined to reconsider its ruling. App. 88.

After Vermont filed a notice of appeal, the district court stayed the trial proceedings pending appeal. The stay, by stipulation of the relator and Vermont, remains in effect while Vermont seeks review by this Court.

3. On December 7, 1998, a divided court of appeals affirmed the district court's denial of Vermont's motion to dismiss. The Second Circuit held that the Eleventh Amendment does not bar such suits because the United States is the real party in interest and therefore the Eleventh Amendment's limitation on the court's Article III jurisdiction does not apply. The court of appeals also held that Congress meant to include States as "persons" subject to suit under the FCA.

Judge Weinstein, sitting by designation, dissented. After an exhaustive analysis of the history and nature of the Eleventh Amendment, he concluded that, "the False Claims Act unnecessarily upsets a cooperative process

essential to American federalism" and thus, Stevens' claim should be barred by the Constitution. App. 85.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SQUARELY IN CONFLICT OVER BOTH QUESTIONS PRESENTED

The issue of whether States are subject to *qui tam* actions under the False Claims Act presents two issues, both of which the Second Circuit addressed directly and in detail. It held that the Eleventh Amendment does not bar a private *qui tam* plaintiff from commencing and prosecuting a FCA suit against a State. The Second Circuit also held that States fall within the undefined term "person" that establishes the class of defendants that are subject to FCA liability.

Five other circuits have issued nine in-depth opinions directly deciding one or the other of the two questions presented here.¹ Presently, States are not subject to

¹ *United States ex rel. Long v. SCS Business and Technical Inst., Inc.*, Nos. 98-5133, 98-5149, 98-5150, 1999 WL 178713 (D.C. Cir. Apr. 2, 1999) (State is not a "person" subject to FCA liability), *opinion supplemented by* 1999 WL 252644 (D.C. Cir. Apr. 30, 1999) (addressing Fifth Circuit's decision in *Foulds*, and holding that court has jurisdiction to rule that a State is not a person subject to FCA liability); *United States ex rel. Foulds v. Texas Tech Univ.*, No. 97-11182, 1999 WL 170139 (5th Cir. Mar. 29, 1999) (Eleventh Amendment bars FCA action pursued by *qui tam* plaintiff against a State); *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870 (8th Cir. 1998) (State is a "person" subject to FCA liability); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998) (petition for cert. filed) (Eleventh

FCA liability in the D.C. Circuit and, to the extent that the action is commenced or prosecuted by a private relator, States are immune from FCA suits in the Fifth Circuit. The States are presently subject to FCA suits brought by either a *qui tam* plaintiff or the United States in the Second, Fourth, Eighth, and Ninth Circuits.

These conflicts among the Circuits are explicit and irreconcilable. The Circuits, in detailed opinions, express fundamental disagreements over issues basic to the balance of powers between the States and the federal government. Moreover, the Circuits disagree even on how to approach these fundamental issues. See *United States ex rel. Long v. SCS Business & Technical Inst., Inc.*, Nos. 98-5133, 98-5149, 98-5150, 1999 WL 252644 (D.C. Cir. Apr. 30, 1999) (supp. opinion) (discussing the different approaches taken by the D.C. and Fifth Circuits). These conflicts can only be resolved through this Court's review of the questions presented by Vermont.²

Amendment does not bar relator's suit against a State) (dissenting opinion by Panner, District Judge, sitting by designation); *United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F. 3d 1453 (4th Cir. 1997) (Eleventh Amendment does not bar relator's suit against a State); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957 (9th Cir. 1994) (same), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (en banc); *United States ex rel. Milam v. University of Tex.*, 961 F.2d 46 (4th Cir. 1992) (same).

² The State of Arkansas has filed a petition for a writ of certiorari from the Eighth Circuit's holding in *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998) (petition for cert. filed). The sole issue presented there is the constitutional question of whether a private relator can prosecute a FCA suit against a State without running afoul of the Eleventh

A. THE CIRCUITS ARE SQUARELY IN CONFLICT OVER WHETHER STATES ARE "PERSONS" SUBJECT TO LIABILITY UNDER THE FCA

The D.C. Circuit in *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, Nos. 98-5133, 98-5149, 98-5150, 1999 WL 178713 (D.C. Cir. Apr. 2, 1999), established a clear conflict with its sister circuits on the issue of the scope of the term "person" subject to suit under the FCA:

The question presented in this appeal is whether states are defendant persons under the False Claims Act. Contrary to the decisions of the Second and Eighth Circuits, see *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F. 195 (2d Cir. 1998); *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870 (8th Cir. 1998), we hold that they are not.

Long, 1999 WL 178713, at *1.

This disagreement runs deep. The Second Circuit concluded that the undefined term "person" in the FCA, 31 U.S.C. § 3729(a), App. 91, necessarily includes States. App. 30. It held that the plain statement rule, which requires Congress to make its intention unmistakably clear in the language of a statute when it proposes to

Amendment. That issue plainly warrants review by this Court and is presented as well in this case. Accordingly, the Court might wish to consider granting both petitions simultaneously and setting them for separate arguments in light of the statutory question that is also posed here by Vermont.

impose liability upon the States,³ is inapplicable here because the rule only applies where the effect of a statute would intrude on the States' traditional authority, or alter the usual constitutional balance of federal and state powers. The Second Circuit concluded that the "States have no right or authority, traditional or otherwise, to" procure federal funds by means of fraud. App. 21.

Likewise, the Second Circuit declined to apply the "often expressed understanding that 'in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'" *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (quoting *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979)) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941)). The majority reasoned that this usual standard is not a hard and fast rule of exclusion and did not apply here. App. 21.

Instead of applying the plain statement rule or the usual interpretation of "person," the Second Circuit held that the "purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring [a] state . . . within the scope of the law." *Id.* (quoting *Cooper Corp.*, 312 U.S. at 605 (1941)). Indeed, the court of appeals focused on these factors at the expense of the FCA's plain language: "At first glance, the 1863 Act's references to persons 'not in the military' might seem to bespeak an intention to

³ See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

encompass only natural persons, since only natural persons are capable of serving in the armed forces. But the legislative history of the statute seems to the contrary." App. 24.

The Second Circuit found support for its holding in the following: (1) the FCA's legislative history indicates that Congress was concerned about possible fraud by state officials; (2) the FCA contains a provision that allows States and local governments to join state law claims with FCA claims, 33 U.S.C. § 3732(b), App. 104; (3) the FCA's purpose is remedial and should be broadly construed to protect the federal government from fraudulent claims; (4) a 1986 Senate Report indicated that Congress, when it originally enacted the FCA in 1863, intended to include States within the definition of persons; and (5) States, pursuant to 31 U.S.C. §§ 3733(a)(1) & (l)(4), App. 104, 126, are explicitly included within the scope of the FCA's civil investigative demand provisions. App. 23-29.

Point by point, the D.C. Circuit disagreed with the Second Circuit. The D.C. Circuit rejected the Second Circuit's conclusion that the "plain statement" rule does not apply because States do not have traditional authority to commit fraud:

We are unpersuaded by various crabbed analyses of the Court's "clear statement" jurisprudence that we have seen. To characterize the relevant state function at issue, as the Second Circuit did, as fraudulent conduct, *see, e.g., Stevens*, 162 F.3d at 204 ("The States have no right or authority, traditional or otherwise, to engage in [fraudulent] conduct."), is to assume

the conclusion that the function is not an essential one. Using that logic, the Court in *Gregory* would have declined to apply a clear statement rule because it is not essential for the state to discriminate against elderly judges.

Long, 1999 WL 178713, at *15. In short, the D.C. Circuit held that Congress must make its intent clear if it proposes to impose FCA liability on the States. *Id.* at *17.

Moreover, the D.C. Circuit gave full effect to the principle enunciated by this Court in *Will*, 491 U.S. at 64, and *Wilson*, 442 U.S. at 667, that the common usage of the undefined term "person" does not include the States. The court determined that, if the *Will-Wilson* rule is to have "any meaning at all, it must create at minimum a default rule: states are excluded from the term person absent an affirmative contrary showing." *Long*, 1999 WL 178713, at *2. The D.C. Circuit then concluded:

neither the Act as currently written nor as originally passed in 1863 defines the term person. Indeed, the original Act distinguished for punishment purposes between fraudulent acts committed by 'any person in the land or naval forces of the United States,' and 'any person not in the military or naval forces of the United States.' Since states would not have been thought to fall within either classification, that Act can hardly be said to supply facially the requisite affirmative showing that the *Will-Wilson* default rule requires.

Id. at *3 (citations omitted).

The D.C. Circuit also fully addressed the other points relied upon by the Second Circuit, and the D.C. Circuit concluded that: (1) "[t]he bottom line is that appellees

have not pointed to anything in the legislative history of the 1863 Act, or in the events leading up to it, indicating that Congress actually contemplated imposing liability on the states," *id.* at *4; (2) rather than indicating that States are persons, the "more obvious reading of § 3732(b) [the FCA's provision allowing States and local governments to join state law claims with FCA claims, App. 104], however, is that it authorizes permissive intervention by states for recovery of state funds," *id.* at *8; (3) the FCA's remedial and broad purpose "is not helpful" because it "is too general - [and] it was also made in an entirely different context - to answer the serious question whether states were made potential defendants under the Act," *id.* at *3; (4) the 1986 Senate Report is immaterial because "[p]ost enactment legislative history - perhaps better referred to as 'legislative future' - becomes of absolutely no significance when the subsequent Congress (or more precisely, a committee of one House) takes on the role of a court and in its report asserts the meaning of a prior statute," *id.* at *6; and (5) the explicit inclusion of States within the scope of civil investigative demands issued under the FCA stands in contrast to the FCA's liability provisions and, in any event, serves an "obvious" purpose because "states could provide useful evidence to establish that private contractors, for example, made false claims." *Id.* at *5.

In sum, it is difficult to imagine a more profound conflict among the circuits than that posed by the decision below and the D.C. Circuit in *Long*. Not only do those courts disagree about the ultimate outcome, but they categorically disagree about the significance of every subsidiary piece of evidence relevant to Congress's

intent. Given the fundamental importance of the issue of the States' amenability to suit under the FCA, review by this Court is plainly warranted in this case.

B. THE CIRCUITS ARE SQUARELY IN CONFLICT OVER WHETHER THE 11TH AMENDMENT BARS A QUI TAM RELATOR FROM COMMENCING AND PROSECUTING FALSE CLAIMS ACT SUITS AGAINST UNCONSENTING STATES

The Second Circuit, building on the decisions issued by the Fourth, Eighth, and Ninth Circuits, accepted the private relator's allegations as true, and assumed that *qui tam* actions involve some injury to the United States. On that basis, it held that the United States is "a real party in interest," and that these suits are, in effect, brought by the United States, and therefore are not subject to the Eleventh Amendment. App. 17-18. In short, the Second Circuit (along with the Fourth, Eighth, and Ninth Circuits) used a standing analysis to determine the Eleventh Amendment's applicability. See App. 71 ("[O]nce the standing issue is hurdled private plaintiffs bringing suit under the Act are vindicating interests of their own as well as of the government. The fact that the relator is joined with the government does not provide warrant for circumventing the constitutional barrier to an individual's suits against a state.") (Weinstein, D.J., dissenting) see also *United States ex rel. Rodgers v. Arkansas*, 154 F. 3d 865, 869 (Panner, D.J., dissenting) ("'Standing in the shoes of the assignor' may suffice to confer standing to sue or to overcome a contractual defense, but only the United States itself should be able to pierce a state's

sovereign immunity."'). Using this logic, these circuits have concluded that it is permissible for Congress to unleash upon the States a "self-appointed . . . posse of *ad hoc* deputies to uncover and prosecute frauds against the government." *United States ex rel. Milam v. University of Tex.*, 961 F.2d 46, 49 (4th Cir. 1992).

In contrast, the Fifth Circuit has held:

By first asking who has commenced or prosecuted the suit against Texas, **our starting point differs from that of the four other circuit courts that have addressed this issue.** Those courts began their analyses by first determining that the United States is the "real party in interest" in *qui tam* actions. Then, they conclude that because the states enjoy no sovereign immunity from the United States, the Eleventh Amendment does not apply. *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998); *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 201-03 (2d Cir. 1998); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 963 (9th Cir. 1994), *vacated*, 72 F.3d 740 (9th Cir. 1995); *Milam*, 961 F.2d at 50. But these decisions provide no reasons or authority for equating a real party in interest with the party who "commences or prosecutes" the suit. Deciding whether it is Foulds or the United States that has commenced this suit requires, we believe, a harder look than simply recognizing that the United States is a real party in interest.

United States ex rel. Foulds v. Texas Tech Univ., No. 97-11182, 1999 WL 170139, at *7 (5th Cir. Mar. 29, 1999) (footnotes omitted) (emphasis added).

The Fifth Circuit concluded that the United States, while a "relevant" party, was not the party that decided to commence and prosecute the State of Texas. *Id.* at *8. "In actuality, it is as plain as the sun that this suit was not commenced by the United States and that the United States has not intervened to prosecute the case." *Id.* at *6.

It is [the relator] – not the United States as sovereign – who controls all strategic litigation decisions in the case such as how, when and in what manner to make demands on a state, whether to sue a state, how far to push the state toward a jury trial in extended litigation, whether to settle with a state and on what terms, etc.; and it is [the relator] who maintains sole responsibility for financing the litigation and for its costs."

Id. at *10. The Fifth Circuit concluded that the United States cannot be both a "passive party" and a party who "'commences' or 'prosecutes' the suit," as required by the plain language of the Eleventh Amendment. *Id.* at *8.

The Fifth Circuit, relying on this Court's decision in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), recognized "that Congress cannot delegate to private citizens the United States' sovereign exception from Eleventh Amendment restrictions." *Foulds*, 1999 WL 170139, at *8. "Only 'responsible federal officers,' or those who act at their instance and under their control, may exercise the authority of the United States as sovereign. [A relator] does not qualify." *Id.* at *10. Therefore, the Fifth Circuit's end point was as different from that of its sister circuits as its starting point: "In sum, we hold that when the United States has not actively intervened in the action,

the Eleventh Amendment bars *qui tam* plaintiffs from instituting suits against the sovereign states in federal court." *Id.* at *10.

The D.C. Circuit, while deciding *Long* on statutory grounds, nonetheless expressed "profound doubts" that *qui tam* suits against States could be reconciled with the Eleventh Amendment. *Long*, 1999 WL 178713, at *13. It stated that the "real party in interest" argument "appears to us merely to sidestep the core problem because it ignores the relator's undisputed role as a party with a cause of action under the Act." *Id.* at *11. "Still we simply do not see how the government's potential exercise of its power renders the relator any less a party." *Id.* at *12. The D.C. Circuit further determined:

We think our sister circuits have paid insufficient attention to the Supreme Court's decision in *Blatchford*

. . . .

It seems to us that permitting a *qui tam* relator to sue a state in federal court based on the government's exemption from the Eleventh Amendment bar involves just the kind of delegation that *Blatchford* so plainly questioned.

Id. at *9.⁴ The D.C. Circuit went on to recognize the effect on our federalist system of allowing Congress to delegate the United States' authority to sue the States:

⁴ The "sister circuits" referred to by the D.C. Circuit are: the Second Circuit in the instant case, citing *Stevens*, 162 F.3d at 201-03; the Eighth Circuit, citing *Rodgers*, 154 F.3d at 868; the Fourth Circuit, citing *Milam*, 961 F.2d at 50; and the Ninth Circuit, citing *Fine*, 39 F.3d at 962-63. See *Long*, 1999 WL 178713, at *9.

[T]he government does not lightly take on the task of probing into the internal operations of the sovereign states, and may well think it better to leave such politically unpalatable tasks for the *qui tam* relators of the world. Yet, the government wishes the option to sit back while the relator brings an action against a state, thus removing itself from direct accountability and from the subtle political pressures that might have precluded the lawsuit in the first place had the United States been more actively involved from the start. See *Stevens*, 162 F.3d at 225-29 (Weinstein, J., dissenting). That seems quite at odds with the obvious purpose of the Eleventh Amendment since such a suit is emphatically not one brought "at the instance and under the control of responsible federal officers." *Blatchford*, 501 U.S. at 785. We seriously doubt that the government, under the Eleventh Amendment, is entitled to transfer all of the benefits that accrue to it as a plaintiff in the federal courts when it chooses to watch from the sidelines. That could be described as allowing the government to have its constitutional cake and eat it too.

Long at *12.

As compelling as the argument is for review by this Court of the statutory issue presented here, the necessity for review of the Eleventh Amendment question may be even more powerful. The conflict among the Circuits is just as explicit and the D.C. Circuit's treatment of the issue in *Long* strongly suggests that the jurisprudential divisions among the Circuits are even broader. Given the constitutional import of the issue, it cannot be seriously

doubted that certiorari should be granted on this question.

* * *

These conflicts over both the questions presented by Vermont are fundamental and can only be reconciled by this Court's intervention. The opinions of the various circuits are detailed and firmly established. They thoroughly address the myriad issues relevant to each of the questions presented. The Fifth and D.C. Circuits, prior to issuing their decisions, had the benefit of the reasoning of the Second, Fourth, Eighth, and Ninth Circuits. Indeed, the Fifth and D.C. Circuits expressly disagreed with these other circuits. The Second and Eighth Circuits declined to alter their decisions pursuant to petitions for rehearing and rehearing *en banc*; the Second Circuit declined rehearing and rehearing *en banc* after having been apprised of the *Foulds* and *Long* decisions. Thus, no further purpose would be served by postponing this Court's inevitable review of the two questions presented by Vermont.

II. WHETHER STATES CAN BE SUED UNDER THE FALSE CLAIMS ACT RAISES SERIOUS QUESTIONS GOING TO THE HEART OF FEDERAL-STATE RELATIONS

Although the division among the courts of appeals warrants resolution by this Court, it remains the case that resolution of the questions presented is vitally important to the States. This case raises fundamental issues relating to the state/federal balance of power, including whether Congress can create liabilities against the States without

plainly putting the States on notice, and whether Congress can delegate the management and control of its relationship with the States to a private party. Moreover, recent years have seen an explosion in the number of *qui tam* suits filed against the States. Such suits interfere with each State's exercise of its police powers, disrupting the cooperative relationship between each State and the federal government, and exposing the State (and its taxpayers) to substantial defense costs and the risk of civil penalties and treble damages awards. Such a suit by a private person can go forward even though the federal government declines to join the suit, and even though the suit may not be in the United States' interest.

A. WHETHER CONGRESS INTENDED TO PERMIT SUITS AGAINST STATES UNDER THE FALSE CLAIMS ACT PRESENTS AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION

The first question presented is whether States are defendant "persons" under the False Claims Act. This is no ordinary matter of statutory construction, for States are not ordinary defendants under the False Claims Act or any federal statute. States are sovereign entities, which "retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). In recognition of this principle, this Court has traditionally given serious attention to whether Congress intended to impose liability on the States under a particular statutory scheme. See, e.g., *Will*, 491 U.S. at 65-66 (Congress did not intend to include States as "persons"

subject to liability under 42 U.S.C. § 1983); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (Congress did not intend to abrogate the States' constitutional immunity in enacting the Rehabilitation Act); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18-20 (1981) (Congress did not intend to require States to spend state money to fund certain rights as a condition of receiving federal funds). These cases embody the presumption that Congress does not act casually in subjecting States to suit or in imposing financial liability on States.

This presumption is reflected in what the D.C. Circuit described as the "family of 'clear statement' rules," *Long*, 1999 WL 178713, at *17, that this Court applies to legislation that potentially "alter[s] the 'usual constitutional balance between the States and the federal Government.'" *Will*, 491 U.S. at 65 (quoting *Atascadero*, 473 U.S. at 242). The clear statement rule comes into play where the Court must determine whether Congress intended to intrude upon traditional areas of State authority. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Will*, 491 U.S. at 65 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

The liability of States under the False Claims Act is an issue on par with those considered by the Court in *Will*, *Atascadero*, and *Pennhurst*. Suits under the False Claims Act impose substantial burdens on States, requiring them to defend against potentially baseless allegations and putting them at risk for awards of treble damages, civil penalties, and costs. See 31 U.S.C.

§§ 3729(a), 3730(d)(2), App. 92, 99. As explained in Part C, below, such suits intrude upon traditional areas of state authority, including the States' health, environmental, and educational programs. In light of the serious problems posed by this statutory scheme, this Court should determine whether Congress intended to include States as "persons" who may be sued under the False Claims Act.

B. THE PRIVATE PLAINTIFF'S ROLE IN THIS SUIT RAISES THE IMPORTANT CONSTITUTIONAL QUESTION LEFT UNRESOLVED IN *BLATCHFORD V. NATIVE VILLAGE OF NOATAK*: WHETHER THE FEDERAL GOVERNMENT MAY DELEGATE ITS EXEMPTION FROM STATE SOVEREIGN IMMUNITY

Also squarely presented in this case is a significant constitutional question: may Congress delegate the United States' authority to sue a sovereign state to a private party, thus abdicating responsibility for the relationship between the States and the federal government? This question of "delegation" was raised in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). There, the plaintiff Indian tribes argued that the United States had delegated its exemption from state sovereign immunity to the tribes, permitting them to bring an action directly against the State of Alaska. This Court expressed its deep skepticism of this argument:

We doubt, to begin with, that that sovereign exemption *can* be delegated The consent, "inherent in the convention," to suit by the United States – at the instance and under the control of responsible federal officers – is not

consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.

Id. at 785 (emphasis in original). The Court in *Blatchford* ultimately ruled against the tribes on other grounds, without conclusively resolving the "delegation" issue. It should revisit that issue here.

This is a matter of enormous importance to Vermont and the other States. Vermont does not take lightly its obligations as a recipient of federal funds, or its responsibility to carry out its programs for the benefit of its citizens. Nor does Vermont contest that the United States may take appropriate steps to ensure that Vermont properly accounts for federal grant monies.

Vermont strenuously objects, however, to defending its participation in federal programs in the context of a lawsuit brought by a private party motivated solely by a bounty. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871, 1877 (1997) ("As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.") Such suits are an affront to the dignity of States as sovereign entities. See *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (Eleventh Amendment avoids indignity of subjecting States to coercive process of judicial tribunals at instance of private parties). The policing of the relationship between sovereigns is too delicate a task to be left to the whim and greed of private parties.

C. QUI TAM SUITS INAPPROPRIATELY PERMIT PRIVATE INDIVIDUALS TO INTERFERE WITH A STATE'S EXERCISE OF ITS CORE POLICE POWER FUNCTIONS

A sovereign State is plainly unlike any other individual or entity that receives federal funds. Vermont does not bid on contracts with the hope of making a profit by providing a service for the federal government; nor does Vermont compete for federal funding to carry out private projects. As a sovereign entity, Vermont is entrusted with the care of its citizens. *See, e.g., East New York Sav. Bank v. Hahn*, 326 U.S. 230, 232 (1945) (police power of the State is an exercise of the sovereign right of the government to protect the general welfare of the people). This is a responsibility shared by the federal government, and to the extent that it is shared, Vermont relies on federal funds to administer and enforce federal programs. *Cf. Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (in exercise of police power, states and their instrumentalities may act concurrently with the federal government). Such work is uniquely governmental.

Qui tam suits, such as this one brought by a former employee against Vermont's Agency of Natural Resources, interfere with the State's exercise of its police power functions. *See Long*, 1999 WL 178713, at *15 (imposition of liability under the Act "necessarily interferes with a state's sovereign performance of a range of indisputably essential functions"). At issue in this lawsuit is Vermont's enforcement of public health and environmental protection laws. *Cf. Huron Portland Cement Co.*, 362 U.S. at 442 (anti-pollution legislation, enacted with manifest purpose of promoting the health and welfare of the

city's inhabitants, clearly falls within the exercise of the police power). Other States have defended *qui tam* suits involving educational and health care programs. *See, e.g., Long*, 1999 WL 178713, at *15 (administration of state education department); *Foulds*, 1999 WL 170139, at *1 (billing practices at state university hospital); *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 871 (8th Cir. 1998) (state university's research grant application); *United States ex rel. Sanders v. East Alabama Healthcare Auth.*, 953 F. Supp. 1404, 1407 (M.D. Ala. 1996) (hospital billing practices). Indeed, given the range of programs for which States receive federal funds, there are few areas of State responsibility that could not be the target of a suit under the False Claims Act.

As the number of reported decisions involving *qui tam* suits against States indicates, such lawsuits are a growing concern for all the States. *See note 1, supra*. In his dissent, Judge Weinstein observed that the "potential for huge recoveries has spawned the growth of a 'qui tam bar' and a shift in emphasis from defense-contract cases to healthcare related ones involving fraudulent claims submitted to the Medicare and Medicaid programs." App. 67. Healthcare and education are precisely the types of domestic programs traditionally administered by the States, often in cooperation with, and with financial assistance from, the federal government. Should the Second Circuit's decision be permitted to stand, Vermont and other States are likely to bear the burden and expense of many more such *qui tam* actions.

Permitting private plaintiffs to bring such suits – to disrupt core governmental functions and intrude into the

working relationship between two sovereign governments – is contrary to our federalist system. These problems render acute the already great need for review by this Court to resolve the conflict in the Circuits on both questions, *viz.*, whether States can be sued as “persons” under the False Claims Act, and, if so, whether such claims are barred by the Eleventh Amendment.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 11, 1999

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: February 2, 1998 Decided: December 7, 1998)
Docket No. 97-6141

UNITED STATES OF AMERICA, *ex rel.* Jonathan Stevens,
qui tam and as relator,
Plaintiff-Appellee,

UNITED STATES OF AMERICA,
Intervenor,

-v.-

THE STATE OF VERMONT AGENCY OF NATURAL RESOURCES,
Defendant-Appellant.

Before:

KEARSE and WALKER, *Circuit Judges,* and
WEINSTEIN, *District Judge*.*

Appeal from an order of the United States District Court for the District of Vermont, J. Garvan Murtha, *Chief Judge*, denying motion by defendant state agency to dismiss complaint on the grounds that Congress did not intend to include States among “persons” subject to *qui tam* suits under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, and could not abrogate the States’ Eleventh Amendment immunity from such suits.

*Honorable Jack B. Weinstein, of the United States District Court for the Eastern District of New York, sitting by designation.

Affirmed.

Judge Weinstein dissents in a separate opinion.

MARK G. HALL, Burlington, Vermont (Stephen G. Norten, Paul, Frank & Collins, Burlington, Vermont, on the brief), *for Plaintiff-Appellee Stevens*.

DOUGLAS N. LETTER, Appellate Litigation Counsel, Civil Division, United States Department of Justice, Washington, D.C. (Frank W. Hunger, Assistant Attorney General, Department of Justice, Washington, D.C., Charles R. Tetzlaff, United States Attorney for the District of Vermont, Burlington, Vermont, on the brief), *for the United States of America as Intervenor*.

DAVID M. ROCCHIO, Special Assistant Attorney General, Montpelier, Vermont (William H. Sorrell, Attorney General of the State of Vermont, Mark J. Di Stefano, Ronald A. Shems, Rebecca M. Ellis, Assistant Attorneys General, Montpelier, Vermont, on the brief), *for Defendant-Appellant*.

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State of Delaware, Michael J. Rich, Wilmington, Delaware; Margery S. Bronster, Attorney General, State of Hawaii, Girard D. Lau, Honolulu, Hawaii; Alan G. Lance, Attorney General, State of Idaho, David L. Hennessey, Boise, Idaho; James E. Ryan, Attorney General, State of Illinois, Barbara Preiner, Chicago, Illinois; Thomas J. Miller, Attorney General, State of Iowa, Elizabeth M. Osenbaugh, Des Moines, Iowa; Carla J. Stovall, Attorney General, State of Kansas, John W. Campbell, Topeka, Kansas; Andrew Ketterer, Attorney General, State of Maine, Thomas D. Warren, Augusta, Maine; J. Joseph Curran, Jr., Attorney General, State of Maryland, Andrew H. Baida, Baltimore, Maryland; Frank J. Kelley, Attorney General, State of Michigan, Thomas L. Casey, Lansing, Michigan; Mike Moore, Attorney General, State of Mississippi, James F. Steel, Jackson, Mississippi; Joseph P. Mazurek, Attorney General, State of Montana, Clay R. Smith, Helena, Montana; Frankie Sue Del Papa, Attorney General, State of Nevada, Anne Cathcart, Carson City, Nevada; Philip T. McLaughlin, Attorney General, State of New Hampshire, Steven M. Houran, Concord, New Hampshire; Michael F. Easley, Attorney General, State of North Carolina, Andrew A. Vanore, Jr., Raleigh, North Carolina; Betty D. Montgomery, Attorney General, State of Ohio, Simon B. Karas, Columbus, Ohio; W.A. Drew Edmonson, Attorney General, State of Oklahoma, Victor N. Bird, Oklahoma City, Oklahoma; Dan Morales, Attorney General, State of Texas, Javier P. Guajardo, Jr., Austin, Texas; Jan Graham, Attorney General, State of Utah, Annina M. Mitchell, Salt Lake City, Utah; Richard Cullen, Attorney General, Commonwealth of Virginia, Frank S. Ferguson, Richmond, Virginia; Darrell V. McGraw, Jr., Attorney General, State of West Virginia, Silas B. Taylor, Charleston, West Virginia, on the brief), *for Amici Curiae*

States of New York, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Michigan, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Texas, Utah, West Virginia, and the Commonwealth of Virginia, in support of Defendant-Appellant.

MARK B. ROTENBERG, General Counsel, University of Minnesota, Minneapolis, Minnesota (Mark A. Bohnhorst, Associate General Counsel, Minneapolis, Minnesota; James E. Holst, General Counsel, University of California, John F. Lundberg, Christopher M. Patti, Oakland, California; Elizabeth M. Barry, Co-Interim General Counsel, University of Michigan, Ann Arbor, Michigan; C. Peter Magrath, President, National Association of State Universities and Land-Grant Colleges, Washington, D.C.), *filed a brief on behalf of Amici Curiae Regents of the University of Minnesota, Regents of the University of California, Regents of the University of Michigan, and the National Association of State Universities and Land-Grant Colleges, supporting reversal.*

FREDERICK ROBINSON, Washington, D.C. (Christine P. Hsu, Fulbright & Jaworski, Washington, D.C., David C. Birdoff, Fulbright & Jaworski, New York, New York; Joseph A. Keyes, Jr., Washington, D.C.; Sheldon E. Steinbach, Washington, D.C.), *filed a brief on behalf of Amici Curiae Association of American Medical Colleges and American Council on Education, supporting reversal.*

PRISCILLA R. BUDEIRI, Washington, D.C. (Gary W. Thompson, Lisa R. Hovelson, Alan Shusterman, Washington, D.C.), *filed a brief on behalf of Amicus Curiae Taxpayers Against Fraud, The False Claims Act Legal Center, in support of Plaintiff-Appellee.*

KEARSE, Circuit Judge:

Defendant State of Vermont Agency of Natural Resources (the "Agency" or the "State") appeals from an order of the United States District Court for the District of Vermont, J. Garvan Murtha, *Chief Judge*, denying the State's motion to dismiss the present *qui tam* suit brought by Jonathan Stevens on behalf of the United States under the False Claims Act, 31 U.S.C. § 3729 *et seq.* (1994) ("FCA" or the "Act"), for lack of subject matter jurisdiction. The district court ruled that the State is a "person" within the meaning of § 3729(a) and is thus subject to suit under the Act, and that such suits are not barred by the Eleventh Amendment. The State challenges these rulings on appeal. For the reasons set forth below, we affirm.

I. BACKGROUND

At all relevant times, the Agency was a recipient of federal funds, and Stevens was an employee of the Agency. Stevens commenced this action as a *qui tam* suit under the FCA for himself and the United States, alleging that the Agency had made fraudulent claims against the United States. The allegations of the complaint, taken as true for purposes of the State's motion to dismiss, include the following.

A. The Complaint

The Agency, through its Department of Environmental Conservation ("DEC") and a DEC subdivision called the Water Supply Division ("WSD"), was the recipient of

a series of federal grants administered by the United States Environmental Protection Agency ("EPA") under, *inter alia*, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* These grants, which substantially funded WSD's budget, provided federal funds to pay for, *inter alia*, salary expenses for work performed by WSD employees in connection with the grants.

As a recipient of these funds, the Agency was subject to certain reporting requirements, including the requirement that it submit time and attendance records reflecting the hours actually worked and the work actually performed by the pertinent individual employees. The complaint alleges that DEC instead made advance estimates of the federal-grant-attributable time to be worked by individual WSD employees in a given federal fiscal year and instructed those employees to fill out their biweekly reports, purporting to show actual work done, to match DEC's estimates, regardless of the time actually worked: "[e]mployees of . . . DEC did not work the hours which were arbitrarily assigned to them, nor did they record the hours they actually worked" (Complaint ¶ 36).

The complaint alleges that the Agency thus "knowingly and continuously submitted false claims to EPA for salary and wage expenses of its employees purporting to show that employees were working on federally-funded projects when, in fact, they were not working the hours as reported." (*Id.* ¶ 39.) This allowed the Agency to retain funds to which it was not entitled for a given year. In addition, because DEC reported each year that all of the federal grant moneys received had been properly used,

and proceeded to submit new grant requests using estimates based on the previous year's reported spending level, the false reports for a given year enabled the Agency to maintain or increase its funding in each succeeding fiscal year.

Stevens and other DEC employees complained to their supervisors that the biweekly reports that DEC instructed the employees to fill out were not accurate and that the reported hours were not being worked. Management instructed them to continue in accordance with DEC's prior instructions. The complaint also alleges, on information and belief, that a similar course of action was followed in several DEC subdivisions other than WSD.

Stevens commenced the present suit in May 1995. As required by the Act, *see* Part II.A. below, he filed the complaint *in camera* and under seal, without serving it on the State, and served a copy, together with material evidence supporting it, on the United States (the "government") in order to allow the government to investigate the allegations and to decide whether it wished to intervene. In June 1996, having sought and received several extensions of time in which to make that decision, the government filed notice that it declined to intervene. It requested, however, that it be served with copies of all pleadings filed in the case; it reserved the right to order transcripts of depositions; and it expressly reserved the right to intervene against the State, for good cause shown, at a later time. The government also requested that it be given notice and an opportunity to be heard in the event that Stevens or the State sought to have the action dismissed, settled, or otherwise discontinued.

In July 1996, the district court ordered that the complaint be unsealed and served on the State.

B. The Denial of the State's Motion To Dismiss

In March 1997, the State moved to dismiss the complaint for lack of jurisdiction, contending (1) that states and their instrumentalities (collectively "States") are not "person[s]" under § 3729(a) who are subjected to suit or liability by the terms of the Act, and (2) that, in any event, the imposition of such liability on the States would violate the Eleventh Amendment. Stevens opposed the motion and was supported by the United States as *amicus curiae*.

In an Order dated May 9, 1997 ("Order"), the district court denied the motion to dismiss. The court rejected the State's contention that the Act does not make States "person[s]" who are subject to liability under the Act, noting that States have considered themselves "persons" within the meaning of the Act in order to bring suits as *qui tam* plaintiffs, and pointing out that, as a matter of statutory construction, identical words used in different parts of the same statute should normally be accorded the same meaning. The court stated that

it would be anomalous to acknowledge that a state is a "person" within the meaning of the statute if it chooses to bring a False Claims Act suit, but that the same state is not a "person" if named as a defendant.

Order at 2. The court rejected the State's claim of Eleventh Amendment immunity on the ground that that Amendment does not bar suits against the States by the

United States itself, and that the United States "is the real party in interest and ultimately the primary beneficiary of a successful *qui tam* action." *Id.* at 1.

The State has appealed, see generally *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (district court order denying motion to dismiss on ground of Eleventh Amendment immunity is immediately appealable), and proceedings in the district court have been stayed pending appeal.

II. DISCUSSION

On appeal, the State contends (1) that Congress did not intend to subject States to suit or liability under the FCA, and (2) that to the extent that the Act is construed to permit *qui tam* suits against the States, the Act violates the immunity conferred on the States by the Eleventh Amendment. The United States, which declined to intervene in the suit in the district court, has intervened in this appeal pursuant to 28 U.S.C. §§ 517 and 2403(a) (1994) to support the decision of the district court.

A. The Scope and Qui Tam Provisions of the Act

The FCA imposes civil liability on "[a]ny person" who makes a false monetary claim to the United States government. 31 U.S.C. § 3729(a). Such a person is liable to the government for treble damages plus a \$5,000-\$10,000 civil penalty:

(a) **Liability for certain acts.** Any person who -

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; [or]

....

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person

....

31 U.S.C. § 3729(a). The Act does not define the term "person."

The Act permits the Attorney General of the United States to bring a civil suit against "the person" who has violated § 3729(a). See 31 U.S.C. § 3730(a). It also permits a *qui tam* suit to be brought by "[a] person" as follows:

Actions by Private Persons – (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States

Government. The action shall be brought in the name of the Government.

31 U.S.C. § 3730(b)(1). If a *qui tam* action has been brought, the United States must be given an opportunity to intervene and take control of the action. The Act requires that the complaint filed by a *qui tam* plaintiff (or "relator") be kept under seal, without service on the defendant, for at least 60 days, *Id.* §§ 3730(b)(2), (3), and that the government be provided with a copy of the complaint and "written disclosure of substantially all material evidence and information the person possesses," *id.* § 3730(b)(2), in order to permit the government to decide whether to intervene at the outset. See *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 998-999 (2d Cir. 1995); S. Rep. No. 99-345, at 24 (1986) ("Senate Report" or "Report"), reprinted in 1986 U.S.C.C.A.N. 5266, 5289 (sealing provision "is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine . . . whether it is in the Government's interest to intervene and take over the civil action"). Failure to comply with these mandatory threshold requirements warrants dismissal of the *qui tam* complaint with prejudice, which bars the *qui tam* plaintiff from refiling such a suit, but leaves the government free to bring suit on its own. See, e.g., *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d at 999-1000 & n. 6.

Even if the government elects not to intervene at the outset, it may intervene upon a showing of good cause at any time thereafter. See 31 U.S.C. § 3730(c)(3). Good cause has been found to exist upon a showing, for example, of the government's realization that the alleged frauds were

of greater magnitude than originally believed, *see, e.g., United States ex rel. Hall v. Schwartzman*, 887 F.Supp. 60, 62 (E.D.N.Y.1995), the government's receipt of additional evidence through a related civil trial, *see, e.g., United States ex rel. Stone v. Rockwell International Corp.*, 950 F.Supp. 1046, 1048-49 (D.Colo.1996), or the government's collateral concern that prosecution of the *qui tam* action could impede government efforts to achieve peace in the relevant industry, *see, e.g., United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing House Co.*, 151 F.3d 1139, 1142 (9th Cir. 1998).

If the government intervenes, it thereby takes control of the suit, *see, e.g., 31 U.S.C. § 3730(b)(4)(A)* ("the action shall be conducted by the Government"), and has "primary responsibility for prosecuting the action," *id.* § 3730(c)(1). The *qui tam* relator is allowed to continue to participate in the action, although the court, at the urging of either the government or the defendant, may limit the *qui tam* relator's role in the litigation upon a showing, for example, that his unrestricted participation would be for purposes of harassment. *Id.* § 3730(c)(2)(C), (D). In addition, the government may ask the court to limit the *qui tam* relator's participation on other grounds, such as undue interference with or delay of the government's prosecution of the case. *Id.* § 3730(c)(2)(C). The government is not bound by any act of the *qui tam* plaintiff. *See id.* § 3730(c)(1).

Moreover, the government has substantial authority to terminate the suit, even over the objection of the *qui tam* relator. For example,

[t]he Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

Id. § 3730(c)(2)(B). Further,

[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

Id. § 3730(c)(2)(A). The government is thus given ample authority, whether through settlement or dismissal, to bring the litigation to an early end, and although the *qui tam* plaintiff must be given a hearing, the court need not, in order to dismiss, determine that the government's decision is reasonable. *See, e.g., United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d at 1145 (in light of Separation of Powers concerns, district court need find only that the government's decision to dismiss a *qui tam* suit, even a meritorious one, is supported by a "valid governmental purpose" that is not arbitrary or irrational and has some "rational relation" to the dismissal).

If the United States chooses not to intervene, which gives the *qui tam* plaintiff "the right to conduct the action," 31 U.S.C. § 3730(b)(4)(B); *id.* § 3730(c)(3), the government nonetheless retains significant control over the action. No other person may intervene. *See* 31 U.S.C. § 3730(b)(5). The government is entitled to monitor the

proceedings, *see id.* § 3730(c)(3) (government may require service of copies of all pleadings and deposition transcripts); it is entitled to have discovery stayed if discovery would interfere with its investigation or prosecution of a criminal or civil suit arising out of the same facts, *see id.* § 3730(c)(4); and, as indicated above, it retains the right to intervene at any time for good cause, *see id.* § 3730(c)(3). Further, the *qui tam* "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Id.* § 3730(b)(1).

Any recovery in a *qui tam* action, whether or not the government intervenes, belongs principally to the United States. The *qui tam* relator will generally be entitled to receive a share of the government's recovery, which ranges from 15 to 25 percent if the United States has intervened, *see id.* § 3730(d)(1), or from 25 to 30 percent if it has not, *see id.* § 3730(d)(2). The *qui tam* relator's award is paid only from "the proceeds" of the suit, *id.* §§ 3730(d)(1), (2), which may consist of an adjudicated amount or a settlement amount. Thus, 70 to 85 percent of the proceeds recovered in a *qui tam* suit belongs to the United States.

B. The Eleventh Amendment Defense

The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although the terms of the

Amendment, which embody the principle of sovereign immunity, refer only to suits against a state by persons who are not citizens of that state, it is clear that, unless the state has given its consent, the Amendment also bars a suit against the state by its own citizens, *see Hans v. Louisiana*, 134 U.S. 1, 10-11 (1890), as well as suits by a foreign nation, *see Monaco v. Mississippi*, 292 U.S. 313, 330-32 (1934), or by an Indian tribe, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

As against the United States, however, States have no sovereign immunity. *See, e.g., West Virginia v. United States*, 479 U.S. 305, 311 (1987); *United States v. Texas*, 143 U.S. 621, 644-46 (1892). When the States, in framing and adopting the Constitution, agreed to create a federal government "established for the common and equal benefit of the people of all the States," *id.* at 646, they necessarily recognized that the privilege of immunity would be inconsistent with that government's paramount sovereignty. A permanent waiver of the States' immunity from suit by the United States is "inherent in the constitutional plan." *Monaco v. Mississippi*, 292 U.S. at 329; *see Blatchford v. Native Village of Noatak*, 501 U.S. at 781-82; *United States v. Minnesota*, 270 U.S. 181, 195 (1926) ("[o]f course the immunity of the State is subject to the constitutional qualification that she may be sued . . . by the United States"); *United States v. Texas*, 143 U.S. at 646. In sum, "nothing in [the Eleventh Amendment] or in any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 128, 140 (1965); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 71

n. 14 (1996) ("the Federal Government can bring suit in federal court against a State").

The question for the present case is whether a *qui tam* suit under the FCA should be viewed as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred. The interests to be vindicated, in combination with the government's ability to control the conduct and duration of the *qui tam* suit, persuade us that the Eleventh Amendment does not bar such a suit.

The real party in interest in a *qui tam* suit is the United States. All of the acts that make a person liable under § 3729(a) focus on the use of fraud to secure payment from the government. It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share – at least 70% – of any recovery. To be sure, the *qui tam* plaintiff has an interest in the action's outcome, but his interest is less like that of a party than that of an attorney working for a contingent fee. See, e.g., *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, ___, 117 S. Ct. 1871, 1877 (1997) (*qui tam* plaintiff is ordinarily "motivated primarily by prospects of monetary reward rather than the public good"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n. 5 (1943) (*qui tam* plaintiffs act "under the strong stimulus of personal ill will or the hope of gain" (internal quotation marks omitted)). *Qui tam* claims simply do not seek the vindication of a right belonging to

the private plaintiff, and if there has been no injury to the United States, the *qui tam* plaintiff cannot recover.

In sum, "although *qui tam* actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest in any such action." *Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990). Accord *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994); *United States ex rel. Milam v. University of Texas*, 961 F.2d 46, 50 (4th Cir. 1992) ("United States is the real party in interest in any False Claims Act suit, even where it permits a *qui tam* relator to pursue the action on its behalf").

Further, as described in Part II.A., the government has the right to control the action. If it wishes to intervene in the action at the outset, the *qui tam* plaintiff cannot prevent it from doing so. Whether or not the government intervenes, it has the right to be kept abreast of discovery in the *qui tam* suit and the right to prevent that discovery from interfering with its investigation or pursuit of a criminal or civil suit arising out of the same facts. If the government intervenes, it takes control of the lawsuit; it may have the participation of the *qui tam* plaintiff limited; and it is not bound by any act of the *qui tam* plaintiff. The government has both the right to prevent a dismissal sought by the *qui tam* plaintiff and the right to cause the action to be dismissed for any rational governmental reason, notwithstanding the *qui tam* plaintiff's desire that it continue.

In light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits, we conclude that such a suit is in essence a suit by the United States and hence is not barred by the Eleventh Amendment. *Accord United States ex rel. Rodgers v. Arkansas*, 154 F.3d at 868; *United States ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453, 1458-59 (4th Cir.), *cert. denied*, 118 S. Ct. 301 (1997); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 962-63 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (*en banc*), *cert. denied*, 517 U.S. 1233 (1996); *United States ex rel. Milam v. University of Texas*, 961 F.2d at 50.

The State's reliance on *Blatchford v. Native Village of Noatak*, 501 U.S. 775, for the contrary proposition is misplaced. In that case, Native American tribes sued the State of Alaska, arguing that they should be allowed to bring such a suit because the United States is empowered to bring a suit for the benefit of the tribes. Plainly in those circumstances, however, the injury to be remedied was one to the tribes, not to the federal government, and the cause of action did not belong to the government. The Supreme Court's rejection of the contention that the tribes should be allowed to pursue their own rights in suits against the States does not persuade us that the United States may not authorize a person other than the Attorney General to bring suit against the States on behalf of the United States to assist the United States in recovering moneys of which it has been defrauded.

We thus turn to the remaining question, over which we exercise pendent appellate jurisdiction, of whether *qui tam* suits against the States are authorized by the Act.

C. Applicability of the False Claims Act to the States

The question is whether "person" in § 3729(a), the section imposing liability, includes States. At the outset, we note the State's contention that we should apply the "plain statement" rule and decline to construe § 3729(a) as exposing the States to liability absent the clearest of legislative statements that that was Congress's intent. We reject this contention.

The "plain statement" rule is that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see id.* at 349 n. 16 (collecting cases). The Supreme Court has never held that this principle is applicable in every instance in which it is argued that a statute imposes liability on the States. *Cf. Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 205 (1991) (refusing to adopt a "*per se* rule prohibiting the interpretation of general liability language to include the States, absent a clear statement by Congress to the effect that Congress intends to subject the States to the cause of action"). Rather, the Court has applied the plain statement rule only when the effect of the statute would be to intrude on the States' traditional authority and "upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The rule has thus been applied to such

questions as whether, in enacting a criminal statute, Congress meant to "render[] traditionally local criminal conduct a matter for federal enforcement and . . . dramatically intrude[] upon traditional state criminal jurisdiction," *United States v. Bass*, 404 U.S. at 350; or whether, in passing the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010, Congress intended to impose an affirmative obligation on the States to provide certain kinds of treatment to the disabled, *see, e.g., Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 16-17 (1981); or whether, in passing the Age Discrimination in Employment Act, Congress meant to override the States' traditional authority to "determine the qualifications of their most important government officials," *Gregory v. Ashcroft*, 501 U.S. at 463. The plain statement rule has not been applied to legislation that does not interfere with traditional state authority, such as an Internal Revenue Code provision allowing the Commissioner of Internal Revenue to require a state official to honor a levy on the salary of a state employee who is delinquent in payment of his federal taxes, *see Sims v. United States*, 359 U.S. 108, 112-13 (1959). *See also Reich v. New York*, 3 F.3d 581, 589-90 (2d Cir. 1993) (requirement that state pay overtime to state law enforcement officials under the Fair Labor Standards Act did not so alter the federal-state balance as to require a clear statement), *cert. denied*, 510 U.S. 1163 (1994), overruled by implication on other grounds by *Seminole Tribe v. Florida*, 517 U.S. at 59-66.

In the FCA, we see no alteration of "the usual constitutional balance of federal and state powers" such as to require application of the plain statement rule. The Act

does not intrude into any area of traditional state power. The goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud. The States have no right or authority, traditional or otherwise, to engage in such conduct. Accordingly, we reject the State's contention that the plain statement rule applies, and we turn to the question of the proper interpretation of the FCA using the usual standards of statutory construction.

Under the usual standards, although "in common usage[] the term 'person' does not include the sovereign, . . . there is no hard and fast rule of exclusion." *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941). "Whether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Sims v. United States*, 359 U.S. at 112; *see Georgia v. Evans*, 316 U.S. 159, 161 (1942). "The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring [a] state . . . within the scope of the law." *United States v. Cooper Corp.*, 312 U.S. at 605.

In the FCA, the principal uses of the term "person" are found in 31 U.S.C. §§ 3729 and 3730, which provide that "[a]ny person" is liable for making false claim, *id.* § 3729(a); that the Attorney General may bring a civil action "against the person," *id.* § 3730(a); and that "[a] person" may bring a *qui tam* action, *id.* § 3730(b)(1). Thus, the same term is used to categorize both those who may sue and those who may be sued, whether by the government itself or by a *qui tam* plaintiff.

In a number of instances, States have brought suits under the FCA as *qui tam* plaintiffs, clearly indicating that they viewed themselves as "person[s]" within the meaning of § 3730(b)(1). See, e.g., *United States ex rel. Woodard and State of Colorado v. Country View Care Center, Inc.*, 797 F.2d 888 (10th Cir. 1986); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *United States ex rel. Hartigan and State of Illinois v. Palumbo Bros., Inc.*, 797 F.Supp. 624 (N.D. Ill. 1992). That view clearly was also shared by Congress. For example, in discussing a bill to amend the Act in 1986, the Senate Report cited the decision in *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, in which the Seventh Circuit had refused to allow the State of Wisconsin to act as a *qui tam* relator in a Medicaid fraud action, ruling that the court lacked jurisdiction over such a suit because the United States already possessed the information on which the suit was premised, even though the information had been unearthed solely by the State of Wisconsin. See Senate Report at 12-13, reprinted in 1986 U.S.C.C.A.N. at 5277-78. The Report cited the case with disapproval because of the jurisdictional limitation read into the statute by the court of appeals, and the 1986 amendments added provisions specifying that *qui tam* suits could be brought even on the basis of already-disclosed information so long as the *qui tam* plaintiff was the original source of the information, see 31 U.S.C. §§ 3730(e)(4)(A), (B). These provisions were added at the prompting of the National Association of Attorneys General, which had pointed out that it unnecessarily inhibited the detection and prosecution of fraud on the federal government "to prohibit sovereign states

from becoming *qui tam* plaintiffs because the U.S. Government was in possession of information provided to it by the State." Senate Report at 13, reprinted in 1986 U.S.C.C.A.N. at 5278 (internal quotation marks omitted). The only controversy sparked by *United States ex rel. Wisconsin v. Dean* and resolved by these new sections was the status of the information on which a *qui tam* suit could properly be brought; there was no question whatever that *qui tam* suits could be brought by the States.

Further confirmation that Congress viewed the States as persons who could be *qui tam* plaintiffs may be found in another 1986 amendment, which permits the joinder, in an FCA suit, of related state-law claims where those claims are "for the recovery of funds paid by a State." 31 U.S.C. § 3732(b). The amendment was adopted "in response to comments from the National Association of Attorneys General," Senate Report at 16, reprinted in 1986 U.S.C.C.A.N. at 5281; presumably it is the State, and not a private party, that would have the right to recover such funds. The Report described the new section as "allowing State and local governments to join State law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence." *Id.*, reprinted in 1986 U.S.C.C.A.N. at 5281. Since intervention, other than by the government, is not allowed in a *qui tam* suit, Congress's provision for joinder of claims of a State must have been premised on the view that the State may be the *qui tam* plaintiff.

We thus think it plain that the States are "person[]s" within the meaning of § 3730(b)(1). Absent some indication to the contrary, we normally infer that in using the same word in more than one section of a statute – or

indeed twice within the same section, as in subsections (a) and (b) of § 3730 – Congress meant the word to have the same meaning. See, e.g., *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996); *Sullivan v. Strop*, 496 U.S. 478, 484 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986). We see nothing in the language of the FCA to indicate that Congress intended that States would be “person[s]” within the meaning of § 3730(b)(1) but not “person[s]” within the meaning of § 3729(a) or § 3730(a).

Nor do we see any such indication in the legislative history. The FCA has its origin in a 1863 statute entitled “An Act to prevent and punish Frauds upon the Government of the United States,” March 2, 1863, ch. 67, § 3, 12 Stat. 696 (1863) (“1863 Act”). The 1863 Act similarly used the term “person” to designate both those who could be found liable under the law and those who could bring suit on behalf of the government. See *id.* §§ 3, 4. With respect to false monetary claims made to the United States, the 1863 Act imposed both criminal and civil liability on “any person in the land or naval forces of the United States,” 1863 Act, § 1, and on “any person not in the military or naval forces,” *id.* § 3. The 1863 Act provided that a *qui tam* suit could be brought “by any person,” against “the person doing or committing” the forbidden fraudulent act. *Id.* § 4.

At first glance, the 1863 Act’s references to persons “not in the military” might seem to bespeak an intention to encompass only natural persons, since only natural persons are capable of serving in the armed forces. But the legislative history of the statute seems to the contrary. The impetus for enactment of the 1863 Act was “stopping

the massive frauds perpetrated by large contractors during the Civil War.” *United States v. Bornstein*, 423 U.S. 303, 309 (1976); see, e.g., Senate Report at 8, reprinted in 1986 U.S.C.C.A.N. at 5273 (“The False Claims Act was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts.”). This was the theme of the statements of Senator Howard, sponsor of a predecessor of the bill that became the 1863 Act. See Cong. Globe, 37th Cong., 3d Sess. 952 (1863) (“[t]he country . . . has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war” by “persons who are contractors, or who are employed to contract for ships, vessels, steamers, watercraft, ordnance, arms, munitions of war, & c.”); *id.* at 955 (“some frauds of a very gross character have already been practiced in the purchase and furnishing of small arms for the use of the Army. Arms have been supplied which, on examination and use, have turned out to be useless and valueless”); and *id.* at 957 (decrying “the enormous and flagrant frauds connected with the military service which are perpetually practiced upon the Treasury”).

Further, among the concerns of Congress at that time were instances of fraud by state officials in the procurement of military supplies for state troops, the costs of which were ultimately borne by the United States. See *Government Contracts*, H.R.Rep. No. 37-2, pt. ii-a (1862). This House of Representative report stated that “testimony ha[d] been taken by the committee bearing directly on the purchase of miliary supplies by the State of Indiana”; that “[t]estimony of the same character ha[d] been taken in reference to the States of Ohio, New York, and

Illinois"; and that the hearings had revealed an "unpardonable eagerness" on the part of state officials to engage in "fraud and speculation" in connection with "large and lucrative government contracts" for supplies for state troops, a subject of federal concern because "the general government ha[d] assumed the liabilities incurred by the several States in furnishing supplies for their respective troops." *Id.* at XXXVIII, XXXIX. Although this report did not mention any pending proposal for a false-claims act, it is difficult to suppose that when Congress considered the bills leading to the 1863 Act a year later it either meant to exclude the States from the "persons" who were to be liable for presentation of false claims to the federal government or had forgotten the results of this extensive investigation.

It is against this background that the 1863 Act, designed to reach procurement officers, "contractors[,] and the agents of contractors," Cong. Globe, 37th Cong., 3d Sess. at 955, imposed liability on all persons in the military and all persons not in the military. These provisions, in combination, are all-encompassing, and we see no indication that Congress meant to carve out any safe haven for frauds perpetrated by the States.

Given the scope of the language used, the statute's purpose has been described as "broadly to protect the funds and property of the Government from fraudulent claims." *Rainwater v. United States*, 356 U.S. 590, 592 (1958); see also *United States ex rel. Marcus v. Hess*, 317 U.S. at 541 n. 5 (goal of the FCA is "remedial," "to protect the Treasury" (internal quotation marks omitted)). In interpreting the Act broadly in 1968, and concluding that an

application for a federal agency loan is a "claim" within the meaning of the Act, the Supreme Court noted that

[t]he original False Claims Act was passed in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War. Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.

United States v. Neifert-White Co., 390 U.S. 228, 232 (1968).

The 1863 Act was codified as part of Title 31 of the United States Code in 1943, and § 3 of the 1863 Act became 31 U.S.C. § 3729 and prohibited presentation to the government of fraudulent claims by persons not in the military. The present language of the Act was adopted as part of the 1986 amendments, which were designed to enhance the ability of the government to "recover losses sustained as a result of fraud" against it in "federal programs and procurement." Senate Report at 1-2, reprinted in 1986 U.S.C.C.A.N. at 5266. Congress changed the language of § 3729(a) from "[a] person not a member of an armed force of the United States," 31 U.S.C. § 3729(a) (1982), to simply "[a]ny person." There was no suggestion in the Senate Report accompanying these amendments that the change was envisioned as broadening the class of persons who could be held liable under the Act; rather, that class was already viewed as all-encompassing. Thus, in a section describing the "history" of the FCA, the Report stated that

[t]he False Claims Act reaches all parties who may submit false claims. The term 'person' is used in

its broad sense to include partnerships, associations, and corporations . . . as well as *States and political subdivisions thereof*. . . .

The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services. Accordingly, a false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation.

Senate Report at 8-9, reprinted in 1986 U.S.C.C.A.N. at 5273-74 (emphasis added).

The 1986 amendments also added to the Act a provision for civil investigative demands (the "CID provision"), authorizing the Attorney General to issue written discovery demands as part of a "false claims law investigation." 31 U.S.C. § 3733(a)(1). The CID provision includes a set of definitions, *see id.* § 3733(l), and under those definitions, "the term 'false claims law investigation' means any inquiry conducted . . . for the purpose of ascertaining whether *any person* is engaged in any violation of a *false claims law*," *id.* § 3733(l)(2) (emphasis added); the term "false claims law" includes the FCA, *see id.* § 3733(l)(1); and "the term 'person' . . . includ[es] any State or political subdivision of a State," *id.* § 3733(l)(4). Presumably, Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the "persons" who are suable under the Act.

The State contends that Congress included the CID provision's definitional language because it believed that

States were not included previously. Such an inference is belied by, *inter alia*, the fact that the section also defines "person" to include "any natural person, partnership, corporation, [or] association," *id.* § 3733(l)(4), i.e., entities whom the FCA unquestionably had always reached. Nor could we reasonably impute such a belief to Congress in light of the fact that, as quoted above, the Senate Report described the FCA as historically reaching frauds by the States. We conclude that Congress's understanding prior to the adoption of the 1986 amendments "was that the False Claims Act applied to the States, and would, after the 1986 amendments, continue to apply to the States" as potential defendants. *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 874-75 (8th Cir. 1998).

The State also argues that the treble damages and penalties for which the Act provides, *see* 31 U.S.C. § 3729(a), are punitive remedies that are not usually associated with suits against the States, and that we therefore should construe the Act as not authorizing such suits. We reject the State's premise. The 1863 Act provided for the recovery of double damages, *see* 1863 Act § 3, and those remedies have been held not to be punitive but remedial, multiple damages being recoverable in order "to make sure that the government would be made completely whole," *United States ex rel. Marcus v. Hess*, 317 U.S. at 551-52, in light of the need "to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims," *United States v. Bornstein*, 423 U.S. at 315. We see no impediment to Congress's applying this remedial structure against States

who, in participating in federally funded programs, knowingly present fraudulent claims to the government.

In sum, we conclude that the term "[a]ny person" in § 3729(a) is sufficiently broad to encompass the States; that Congress meant to include the States within the term "person" in § 3730(b)(1), allowing them to bring suits under that section as *qui tam* plaintiffs; that there is no indication in the language or in the legislative history that Congress ascribed different meanings to the term "person" as used in §§ 3729(a), 3730(a), and 3730(b)(1); and that Congress intended the false-claims statutes to permit suits under §§ 3730(a) and 3730(b)(1) against any entity that presented false monetary claims to the government. We thus conclude that the present suit is authorized by the FCA.

CONCLUSION

We have considered all of the State's arguments on this appeal and have found them to be without merit. The district court's order denying the State's motion to dismiss is affirmed.

WEINSTEIN, J., dissenting:

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I. INTRODUCTION

I respectfully dissent from this decision approving a private *qui tam* federal court lawsuit against a state. In violation of the Eleventh Amendment, the result distorts the dynamics of our federal system, denigrates the traditional role of congresspersons as bridges between their state communities and the national executive branch, and undermines cooperative relationships between federal and state agencies.

II. FACTS

In May 1995 Appellee, an attorney and former employee of Vermont's Agency of Natural Resources ("ANR"), brought this suit for treble damages and civil penalties against the State of Vermont under the *qui tam* provisions of the False Claims Act ("FCA"). The statute authorizes private parties to sue "for [themselves] and for the United States Government," 31 U.S.C. § 3730(b)(1),

any "person" who submits a false or fraudulent demand for payment to the federal government. 31 U.S.C. § 3729(a).

Appellee seeks twenty-five percent of the proceeds of the action as well as reimbursement for reasonable attorneys' fees, costs and expenses. He alleges that Vermont's use of pre-approved percentages of ANR employees' total work hours to account for time spent working on federally-funded projects, rather than actual hours worked, amounts to a fraud on the federal government.

After Appellee filed his complaint under seal, 31 U.S.C. § 3730(b)(2), the United States conducted the requisite diligent investigation of his claims. 31 U.S.C. § 3730(a). This study continued for more than a year, as the government repeatedly was granted extensions of the original sixty-day investigation period provided for in the statute. 31 U.S.C. § 3730(b)(2), (3). Ultimately, the United States decided not to join in the action, leaving Appellee to exercise his statutory right to conduct the litigation against Vermont on his own. 31 U.S.C. § 3730(c)(3).

Vermont moved to dismiss, arguing that Appellee's private lawsuit against the State for money damages was barred by the Eleventh Amendment. When the district court denied its motion, Vermont appealed under an exception to the Final Judgement Rule which permits states to appeal from a district court order denying a claim of Eleventh Amendment immunity. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 145-46 (1993). Allowing an interlocutory appeal

under the collateral order doctrine reflects "the importance of ensuring that the States' dignitary interests can be fully vindicated." *Id.* at 146.

The United States then intervened for the limited purpose of filing a brief opposing Vermont's contention that this FCA suit violated the Eleventh Amendment.

III. LAW

A. Eleventh Amendment

1. Suits by Individuals

Adopted effective January 8, 1798 on demand of the states for protection, the Eleventh Amendment of the Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." Although the Amendment makes no explicit reference to sovereign immunity, it has consistently been interpreted to mean that a state, as a sovereign entity within our constitutional system, may not be sued by an individual – whether a citizen of that state, another state or a foreign country – in federal court without its consent. *See, e.g., Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2033 (1997) ("To respect the broader concept of [sovereign] immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying, we have extended a State's protection from suit to suits by the State's own citizens."); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 144 (1992) ("Absent waiver, neither a State nor agencies acting

under its control may 'be subject to suit in federal court.' " (quoting *Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 480 (1987))); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) ("this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State"); *Ex parte New York*, 256 U.S. 490, 497 (1921) ("the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given").

Disapprobation of the doctrine of immunity, which interferes with "the duty of Government to render prompt justice against itself in favor of its citizens," Abraham Lincoln, first annual message to Congress, quoted in Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* vii (1972), provides no warrant for ignoring a constitutional provision protecting the doctrine. Fortunately, widespread statutory waivers by federal and state governments permitting suits in their own courts have largely eroded this barrier to individual justice. *Cf. id.* at 5-8 (discussing exceptions in medieval England granting remedy to those wronged by the crown or its officers); *id.* at 151-164 (criticizing sovereign immunity as a denial of the rule of law); *John v. Orth*, *The Judicial Power of the United States* 154 (1987) (same). The Eleventh Amendment limits only suits brought in federal courts by individuals against states.

a. Original Understanding

There is no record of any discussion of state immunity at the Constitutional Convention. Nevertheless, federal courts' jurisdiction over suits by private citizens against states which had not consented to such litigation was disavowed by the framers of the Constitution during the pre-ratification debate over the meaning and scope of Article III.

In response to concerns raised at Virginia's ratification convention that the Judiciary Article's provision for suits between a state and citizens of other states would subject the states to suits by individuals in federal court, Madison, our preeminent expert on the Constitution, declared:

It is not in the power of individuals to call any State into Court. The only operation [the provision] can have, is, that if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court. . . . It appears to me that this clause can have no operation but this – to give a citizen a right to be heard in the Federal Court, and if a State should condescend to be a party, this Court may take cognizance of it.

10 Documentary History of the Ratification of the Constitution 1414 (John P. Kaminski & Gaspare J. Saladino eds., 1993); see also (John Marshall), *id.* at 1433 ("I hope no Gentleman will think that a State will be called at the bar of the Federal Court. . . . It is not rational to suppose, that the sovereign power shall be dragged before a Court."). In New York, Hamilton responded to opponents of ratification in a similar vein:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, [immunity] will remain with the States. . . .

The Federalist No. 81, at 487-88 (Clinton Rossiter ed., 1961).

While these statements may be insufficient, standing alone, to establish the existence of a general consensus at the time of the ratification with regard to state sovereign immunity, they may well have played a significant role in securing the approval of the Constitution in those states where the states' amenability to suit by individuals in federal court was at issue. See Jackson Turner Main, *The Antifederalists: Critics of the Constitution* 157 (1961). That the states expected their immunity from private suits – at least those brought by noncitizens – to continue under the Constitution was soon made plain by their reaction to the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that Article III authorized federal jurisdiction over a suit by a South Carolina citizen against the state of Georgia. The response to *Chisolm* was so intense that it took only three weeks for both houses of Congress to approve the Eleventh Amendment, and it was promptly ratified. See Erwin Chemerinsky, *Federal Jurisdiction* § 7.2, at 374 (2d ed.1994); see also Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1048 (4th ed.1996).

While many have speculated that the vigor of the states' reaction to *Chisolm* was due to their fear of a rash of lawsuits to collect unpaid Revolutionary War debts, see *Chemerinsky, id.* & n. 23, the reasons for the overwhelming support of the Eleventh Amendment were more complex. The Amendment was supported by both states' rights advocates and pro-creditor nationalists; assumption of the public debt under Hamilton's financial program had already alleviated much of the states' financial burdens arising from the War of Independence. See Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 70-74 (1972). Whatever the motives, the Amendment stands as a barrier to private suits against a state in federal court without the state's consent.

It is well established that "[t]he Eleventh Amendment does not exist solely in order to preven[t] federal court judgments that must be paid out of a State's treasury." *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (internal quotation marks and citations omitted). The Amendment's "very object and purpose . . . were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *In Re Ayers*, 123 U.S. 443, 505 (1887); see also *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2033 (1997) (immunity is designed to protect "the dignity and respect afforded a State"); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("[The Amendment] accords the States the respect owed them as members of the federation.").

b. Broad Conception

The current broad conception of the Eleventh Amendment as the constitutional guarantor of state sovereign immunity is usually traced to the Supreme Court's decision in *Hans v. Louisiana*, 134 U.S. 1 (1890). See, e.g., *Seminole Tribe v. Florida*, 517 U.S. at 54; *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); see also Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1051 (4th ed. 1996) ("[T]here is no doubt that the decision marked a critical turning point, and that ever since, the Court has not adhered to a 'literal' reading of the Amendment in determining its effect on federal jurisdiction."). In *Hans* a Louisiana citizen and bondholder sued the State of Louisiana claiming that the state's adoption of a constitutional amendment prohibiting the payment of interest on its bonds violated the Contracts Clause of the Constitution. Acknowledging that the literal terms of the Eleventh Amendment did not apply to suits by in-state plaintiffs, *Hans*, 134 U.S. at 10, the Court nonetheless refused to limit the reach of the Amendment to its "letter." *Id.* at 15. In extending the states' immunity from suit beyond the text of the Amendment, the Court relied on the already quoted views of Madison, Hamilton and Marshall. See *Part III.A.I.a., supra*. It recalled the "shock of surprise," *Hans*, 134 U.S. at 11, arising from the Supreme Court's decision in *Chilsohm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793):

The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a state. The reason against it is as strong in this case as it was in that. It is an attempt to strain the constitution and the law to

a construction never imagined or dreamed of. . . . Suppose that congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

Hans, 134 U.S. at 15.

Criticism of the *Hans* Court's approach and its conception of a broad principle of sovereign immunity implicit in the constitutional design have been at the heart of much of the debate over the meaning and scope of the Eleventh Amendment. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 84-93 (1996) (Stevens, J., dissenting); *id.* at 116-185 (Souter, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 259-302 (Brennan, J., dissenting). As the Supreme Court noted recently, "[t]hese criticisms and proposed doctrinal revisions . . . have not found acceptance with a majority of the Court." *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2033 (1997). On the contrary, a consistent course of Supreme Court decisions has reaffirmed the principle that the Eleventh Amendment functions as a constitutional limit on the jurisdictional grant contained in Article III. See, e.g., *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. at 2034 ("[E]leventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction."); *Seminole Tribe*, 517 U.S. at 63. ("[T]he Eleventh Amendment st[ands] for the constitutional principle that state sovereign immunity limit[s] the federal courts' jurisdiction under Article III."); *Atascadero*

State Hosp. v. Scanlon, 473 U.S. at 238 ("[T]he significance of this Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III of the Constitution.' " (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (*Pennhurst II*))).

c. Limited Exceptions

In keeping with the broad and fundamental nature of state sovereign immunity, the Supreme Court has circumscribed necessary exceptions to the states' Eleventh Amendment guarantee of immunity. It has conceded that the states may explicitly waive their immunity and subject themselves to suit in federal court without violating the Eleventh Amendment. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 238 ("[I]f a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action."). A state's immunity will be deemed waived, however, "only where stated 'by the most the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)); see also *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-306 (1990) ("solicitude for States' sovereign immunity" is basis for requirement that States' intent to waive immunity be clearly expressed).

Suits by individuals against state officers to enjoin future violations of federal law are also permitted, under

Ex parte Young, 209 U.S. 123 (1908), even when compliance with the injunction might lead to the incidental expenditure of substantial state funds. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 349 (1979) (upholding order to send members of plaintiff's class notice of entitlement to administrative relief even though this could lead to monetary claims against the state since order was "more properly viewed as ancillary to the prospective relief already ordered by the court"); *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977) (upholding school desegregation decree requiring state to pay half of costs associated with remedial educational programs for children subjected to past segregation); *see also* Patrick J. Barrett, Case Comment, *Edward T. Young Still Living the Good Life: Coeur d'Alene Tribe v. Idaho*, 73 Notre Dame L. Rev. 1077 (1998) (arguing that Supreme Court's recent decision in *Coeur d'Alene Tribe* does not curtail the ability of private plaintiffs to seek prospective relief from state officials in federal court under the doctrine of *Ex parte Young*).

The injunction exception does not encompass suits against state officers in their official capacities for retroactive relief to be paid from the state treasury since such litigations resemble suits for money damages against the state itself. *See Edelman*, 415 U.S. at 663 ("[T]he rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."); *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its

sovereign immunity from suit even though individual officials are nominal defendants.").

Any attempted abrogation by Congress of the states' Eleventh Amendment immunity is subject to two strict requirements. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343, 1347 (Fed. Cir. 1998). First, Congress must unequivocally express its intent to abrogate the immunity, a requirement which arises from "the Eleventh Amendment's role as an essential component of our constitutional structure." *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). *See id.* at 230 ("[E]vidence of congressional intent [to abrogate] must be both unequivocal and textual."); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) ("A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."). Second, Congress' abrogation of sovereign immunity must be "pursuant to a valid exercise of power" under section five of the Fourteenth Amendment. *See Seminole Tribe*, 517 U.S. 44, 55, 65-66. The Fourteenth Amendment warrants this distinction, the *Seminole Tribe* Court explained, because it was adopted "well after the adoption of the Eleventh Amendment and the ratification of the Constitution [and it] operated to alter the pre-existing balance between the state and federal power achieved by Article III and the Eleventh Amendment." *Seminole Tribe*, 517 U.S. 44, 65-66; *see also College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343, 1352 (Fed. Cir. 1998) ("When the states adopted the Fourteenth Amendment and consented to cede a portion of their authority to the federal government, it was

within their contemplation that they limited their Eleventh Amendment immunity.")

2. Suits by the United States

a. Original Understanding

It is well settled that the states' Eleventh Amendment immunity does not extend to suits brought against them by the federal government. *See, e.g., West Virginia v. United States*, 479 U.S. 305, 311 (1987); *United States v. Mississippi*, 380 U.S. 128, 140 (1965) ("[N]othing in this or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States."); *United States v. Minnesota*, 270 U.S. 181, 195 (1926) ("[T]he immunity of the state is subject to the constitutional qualification that she may be sued in this Court by the United States. . . ."); *United States v. Texas*, 143 U.S. 621, 645 (1892) ("It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more states, but not jurisdiction of controversies of like character between the United States and a state.").

Suits by the United States against a state do not denigrate the dignity and respect owed the states in the way that suits by individuals do. "The submission to judicial solution of controversies arising between [the United States and a state], 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' . . . but both

subject to the supreme law of the land, does no violence to the inherent nature of sovereignty." *United States v. Texas*, 143 U.S. 621, 646 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819)).

The possibility of suits by the United States against the states is essential to our federal system. Early on, the framers recognized that the power to enforce federal law against the states would be vital to the Union's stability. *See* Ralph Ketcham, *James Madison: A Biography* 113 (1971) ("[A]fter but twelve days of government under the Articles [of Confederation], Madison proposed an amendment containing fateful language: ' . . . a general and implied power is vested in the United States in Congress assembled to enforce and carry into effect all the articles of the said Confederation against any of the States which shall refuse or neglect to abide by such determinations.' "). Justice Story regarded federal jurisdiction over suits to which the United States are a party as an absolute necessity: "Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the states." Joseph Story, *Commentaries on the Constitution of the United States* § 1674, at 445 (1851); *see also United States v. Texas*, 143 U.S. at 645 (lack of federal jurisdiction over controversies between the United States and a state could jeopardize the "permanence of the Union").

The Supreme Court has consistently recognized that federal supremacy in areas allotted to the national government was implied in the abandonment of the pre-constitutional federation of states. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991) (states' consent

to suit by the United States is "inherent in the [Constitutional] convention"); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) ("While . . . jurisdiction over suits [by the United States against a state] is not conferred by the Constitution in express words, it is inherent in the constitutional plan."); *United States v. Texas*, 143 U.S. 621, 646 (1892) (consent to suit by the United States "was given by Texas when admitted into the Union upon an equal footing in all respects with the other states").

b. No Delegation

The federal government's power to sue a state is a narrow and nontransferable exception to the broad and fundamental constitutional principle of state sovereign immunity embodied in the Eleventh Amendment. The Supreme Court has rejected the argument that the federal government may delegate its authority to sue the states in federal court. In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Court indicated its disapproval of an Indian tribe's attempt to circumvent the requirements of the Eleventh Amendment by arguing that it could sue a state based on a delegation to it of the federal government's power to do so:

[O]ur cases require Congress' exercise of the power to abrogate state sovereign immunity, where it exists, to be exercised with unmistakable clarity. To avoid that difficulty, respondent asserts that § 1362 represents not an abrogation of the State's sovereign immunity, but rather a *delegation* to tribes of the Federal Government's exemption from state sovereign immunity. We

doubt, to begin with, that that sovereign exemption *can* be delegated – even if one limits the permissibility of delegation (as respondents propose) to persons on whose behalf the United States itself might sue. The consent, "inherent in the convention," to suit by the United States – at the instance and under the control of responsible federal officers – is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.

Blatchford v. Native Village of Noatak, 501 U.S. 775, 785.

B. Fundamental to Federalism

The Supreme Court's generous, protective interpretation of the Eleventh Amendment reflects its recognition that the Amendment, as the constitutional repository of state sovereign immunity, is essential to the preservation of our federal system. See, e.g., *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) ("[A]brogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States, placing considerable strain on the principles of federalism that inform Eleventh Amendment doctrine." (internal quotation marks and citations omitted)); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2, (1985) ("Our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution. . . ."); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1992) ("The Amendment is rooted in a recognition that the States, although a union,

maintain certain attributes of sovereignty, including sovereign immunity."); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact"). Accordingly, any discussion of the Eleventh Amendment must take place within the larger context of our federalism and the constitutional balance it was designed to maintain.

1. Original Understanding

Our federalism is dynamic, ensuring decentralization of power by maintaining an appropriate balance between the federal and state governments even as demands on these sovereignties change. See Richard H. Leach, *American Federalism* 59 (1970) ("[D]espite the inclusion of a 'more perfect Union' among the phrases describing the goals of American government in the . . . Constitution, federalism is merely a means to be employed in achieving those goals. . . . Federalism remains process."); Carl J. Friedrich, *Trends of Federalism in Theory and Practice* 7 (1968) ("Federal relations are fluctuating relations in the very nature of things. Any federally organized community must therefore provide itself with instrumentalities for the recurrent revision of its pattern or design."). The founders were well aware that the creation of a system of government capable of fostering and safeguarding a process which would continuously balance centrifugal and centripetal forces was a necessary precondition of the Constitution's ratification and of its successful operation.

In preparation for the Constitutional Convention, Madison had studied every federal system since ancient times. See Ralph Ketcham, *James Madison: A Biography* 183-85 (1971); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 43 (1996) ("[Madison] closed each section of his notes on this reading with a short but pointed list of the 'vices of the constitution' of the particular confederation he had just studied, the peculiar structural and political defects that compromised its strength and vigor."). Madison's experiences as a state legislator and federal representative had made him a proponent of a stronger national government than that afforded by the Articles of Confederation. See, e.g., *id.* at 36-46. His support for a strong national government, however, was well tempered by his belief in the importance of divided power. See Francis R. Greene, *Madison's Views of Federalism in the Federalist*, 24 *Publius* 47, 60 (1994) (characterizing Madison as "only a moderate nationalist, a supporter of energetic national government within a republican - and federal - framework"). In *The Federalist Papers*, both he and Hamilton emphasized the strong role the states were expected to play in the new federation. See *The Federalist No. 9*, at 76 (Hamilton) (Clinton Rossiter ed., 1961) ("The proposed Constitution, so far from implying abolition of the State governments, makes them constituent parts of the national sovereignty . . . and leaves in their possession certain exclusive and very important portions of sovereign power."); *The Federalist No. 17*, at 120 (Madison) (Clinton Rossiter ed., 1961) (fact that states would be responsible for administration of civil and criminal justice would "render them at all times a complete counterpoise, and, not unfrequently,

dangerous rivals to the power of the Union"); *The Federalist* No. 39, at 245 (Madison) (Clinton Rossiter ed., 1961) (jurisdiction of the national government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); *The Federalist* No. 45, at 292 (Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

Madison's nationalism had been tempered in the Convention by the adoption of an equal state vote in the Senate. See Ralph Ketcham, *James Madison: A Biography* 303, 314 (1971). It was further modified by his subsequent experiences as a high federal official, president, and student of developments at the end of the 18th and early 19th centuries. See *id.* at 314 ("[Madison's] nationalism waned as he saw the federal impotence of the last days of the old confederation replaced by the sweeping national possibilities envisioned by [Hamilton's] Report on Public Credit. Separation and balance of powers seemed utterly lost."). During the 1790's, as Hamilton's Federalist party followed an increasingly centralized approach to public policy,

Madison would join with Thomas Jefferson to champion diversity as an instrument superior to imposed national unity for the pursuit of the "common good," and he would seize upon a strict construction of constitutional grants of power to Congress as the bulwark of liberty in the face of what he viewed as outrageous transgressions.

Harry N. Scheiber, *Federalism and the Constitution: The Original Understanding, in American Law and the Constitutional Order* 85, 97 (1978).

Madison accurately predicted that far into the future states would predominate over the national government. *The Federalist* No. 46 (Madison) (Clinton Rossiter ed., 1961). The pre-Civil War discussion of nullification and interposition demonstrates the vehemence with which the supremacy of state sovereignty continued to be asserted more than half a century after adoption of the Constitution. See Ralph Ketcham, *James Madison: A Biography* 640-46 (1971). Until the outbreak of the Civil War, the states – each with "its own particular 'mix' of public policy . . . and with its own set of rules in the establishment of priorities for economic development" – were the centers of power in many areas of importance. Harry Scheiber, *Federalism and the American Economic Order, 1789-1910*, *Law and Soc'y* (Fall 1975) 57, 97. See generally *id.* at 86-100 (discussing diffusion of power and decentralization of control over policy in the antebellum years).

The subsequent expansion of central power resulted in part from ratification of the post-Civil War Amendments and the increasingly broad interpretation of the Commerce Clause and spending power in response to the growth of our national technological, economic and social systems. Nevertheless, even the Civil War, the Thirteenth, Fourteenth and Fifteenth Amendments, and enormous recent changes in our culture, did not alter our essential federal constitutional structure. See *New York v. United States*, 505 U.S. 144, 159 (1992) ("The actual scope of the Federal Government's authority with respect to the States has changed over the years . . . but the constitutional

structure underlying and limiting that authority has not.").

In *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868), decided the same year the Fourteenth Amendment was ratified, the Supreme Court famously declared:

the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.

Id. at 725. Well over a century later, the nation continues to adhere to the same principle of both state and national sovereignty.

2. Current Views

The continuing potency of the states has recently been emphasized by the Supreme Court in a series of cases demonstrating an increased sensitivity to state independence. See, e.g., *Printz v. United States*, 117 S.Ct. 2365 (1997) (holding unconstitutional the enforcement provisions of the Brady Handgun Violence Prevention Act requiring local chief law enforcement officers to perform background checks on gun purchasers); *id.* at 2383 ("[T]he whole *object* of the law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty. . . . It is the very *principle* of separate state sovereignty that such a law offends. . . ."); *Seminole Tribe v. Florida*, 517 U.S. 44

(1996) (holding that the Eleventh Amendment bars Congress from using its power under the Indian Commerce Clause of Article I to expand the jurisdiction of the federal courts under Article III); *id.* at 72 ("[W]e reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government"); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeds Congress' power under the Commerce Clause); *id.* at 567 ("To uphold the Government's contentions here . . . would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."); *id.* at 578 ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."); *New York v. United States*, 505 U.S. 144 (1992) (holding unconstitutional "take-title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985); *id.* at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.").

These decisions iterate with renewed vigor the system of "dual sovereignty" envisioned by the framers and established by the Constitution with the fundamental goal of preventing the expansion of state or federal governmental power at the expense of the liberty of individuals. See, e.g., *New York v. United States*, 505 U.S. 144, 181

(1992) ("State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." (internal quotation marks and citation omitted)); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny from either front."); *id.* at 459 ("In the tension between federal and state power lies the promise of liberty."). They recognize that our federal governmental structure affords its citizens increased liberty through increased political accountability. As the court stated in *Lopez*, "[t]he theory that two governments accord more liberty than one requires for its realization two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *Lopez*, 514 U.S. at 576.

3. Role of National Political Process

The framers envisioned from the outset the prominent role the political process would play in preventing the accumulation of national power at the expense of local interests. See James Thomas Flexner, *The Young Hamilton* 393 (1978) ("Hamilton and Madison responded [to objections to central power by Rhode Island in 1782] with arguments that presaged their defense of the eventual national Constitution in *The Federalist*. The security of general liberty lay not in clipping the wings of the central authority, but in frequent elections and rotation of offices that would keep the central power representative of all

interests."). Madison's own experience as Virginia's representative under the Articles of Confederation gave him a first-hand practical appreciation for how federal representatives must balance their dual responsibilities to their state and to the nation. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 38 (1996) ("The recurring need to balance national and state loyalties shaped the development of Madison's political thinking in important ways."). "The prepossessions, which the members [of Congress] themselves w[ould] carry into the federal government, w[ould] generally be favourable to the States." *The Federalist* No. 46, at 296 (Madison) (Clinton Rossiter ed., 1961). This was not only a background assumption of the constitutional plan, but a prerequisite for its successful functioning, which would depend on the assertion of a multiplicity of interests and points of view. See, e.g., *The Federalist* No. 10, at 83 (Madison) (Clinton Rossiter, ed., 1961) ("Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.").

Scholars and commentators have identified a number of features of the national political process which serve to maintain the strong position of the states in the federal system. Some of these protective mechanisms, such as the Electoral College and the equal state vote in the Senate, are components of our formal, constitutional structure. See, e.g. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection*

of the National Government, 54 Colum. L. Rev. 543, 558 (1954) (outlining the structural safeguards of federalism built into the Constitution and emphasizing "the role of the states in the composition and selection of the central government [as] intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states"); Daniel J. Elazar, *Federalism and Intergovernmental Relations in Cooperation and Conflict: Readings in American Federalism* 9 (Daniel J. Elazar, et al. eds., 1969) ("[P]eople and their interests gain formal representation in the councils of government through their location in particular places and their ability to capture political control of territorial political units."); David L. Shapiro, *Federalism: A Dialogue* 116-117 (1995) (discussing the "significant structural reasons for the retention of state authority in so many areas of general importance" and the "built in role of the states in the administration of the central government").

Other checks on the national power are nonstructural in nature. That is, they are rooted in the political process itself. See, e.g., Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. Kan. L. Rev. 1113, 1114 (1996) (discussing "possible safeguards of federalism that are truly political, giving due attention to political institutions, politicians and interest groups"); D. Bruce La Pierre, *Political Accountability in the National Political Process - The Alternative to Judicial Review of Federalism Issues*, 80 Nw. L. Rev. 577, 633 (1982) ("[P]olitical checks and Congress' political accountability, and not simply the representation of state interests in Congress by representatives elected

from the states, are the political safeguards of federalism."); Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1520-47 (1994) (arguing that the political party system and extensive interactions between federal and state administrators play a particularly important role in protecting state autonomy).

Despite the general effectiveness of these formal and informal mechanisms in protecting state interests, the potential for breakdowns in the political process exists. Such "process failures" threaten both the autonomy of the states and the representativeness of the national government itself. See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 394. ("[I]n undermining the states, the federal government at the same time undercuts those very features of the national political process as a whole (on both the state and national level) on which its own health crucially depends."). The Supreme Court has rejected the idea that political safeguards are sufficient, in and of themselves, to protect the states against federal overreaching. See *Printz v. United States*, 117 S.Ct. 2365, 2382-83 (1997); *New York v. United States*, 505 U.S. 144, 168-69 (1992); see also La Pierre, *supra*, at 665 ("[I]f Congress is not politically accountable, national statutes that intrude on state interests are not justified, and judicially imposed restrictions on Congress' powers are necessary to protect the states."). Rapaczynski, 1985 Sup.Ct.Rev. at 380-419 (analyzing political processes which serve to protect federalism and failures in those processes which may warrant judicial scrutiny). In both *New York v. United States*, 505 U.S. at 168-69, and *Printz v. United States*, 117

S.Ct. at 2382-83, the Court recognized that "process failures" had blurred the lines of political accountability between state and federal representatives to the detriment of our system of dual sovereignty. In *New York v. United States* the Court reasoned that "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York v. United States*, 505 U.S. at 169. The Court's decision in *Printz* rested in part on a similar rationale:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay higher taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Printz, 117 S.Ct. at 2382. While the federalism-based considerations permeating these decisions do not constitute an absolute restraint on congressional action, they do demonstrate the Court's reluctance to uphold federal legislation that distorts the balanced federal-state political process.

Application of the FCA's *qui tam* provisions to the states interferes with the political process in ways which seriously undermine the position of the states vis-a-vis the federal government. As will be demonstrated in Part

IV.C.3, *infra*, assigning the federal government's decision to sue a state to private *qui tam* plaintiffs – who are accountable to no one and motivated primarily by the hope of financial gain – prevents congresspersons from fulfilling their representative function of interceding on behalf of their home states in disputes with the federal government and interferes in the cooperative relationships between state agencies and their federal counterparts.

C. Separation of Powers Challenges

There is no need now to revisit case law upholding the constitutionality of the FCA's *qui tam* provisions in suits against private parties. See, e.g., *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993), *cert. denied*, 508 U.S. 973 (1993) (*qui tam* relators have standing to sue on the government's behalf even though they personally have not suffered actual or threatened injury); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) (FCA *qui tam* provisions do not violate Article III's standing requirements, the Appointments Clause, or separation of powers principles). Nevertheless, it should be noted that FCA *qui tam* suits stand on shaky constitutional ground with respect to the principle of separation of powers as embodied in Article II's Appointments and Take Care Clauses and Article III's standing requirements.

Policy considerations militating in favor of *qui tam* suits against non-state defendants may outweigh the serious separation of powers concerns these suits raise. A

practical and flexible approach to modifying the lines separating powers of the three parts of federal government is necessary. The precise contours of the legislative, executive and judicial powers are not firmly fixed. The need for a workable and efficient system of government has created many areas of overlap between the governmental branches, a result which fully accords with the design of the framers, "practical statesmen, experienced in politics, who. . . . saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976); see also, e.g., *Mistretta v. United States*, 488 U.S. 361, 381 (1989) ("[T]he Framers did not require – and indeed rejected – the notion that the three Branches must be entirely separate and distinct."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."); Hippocrates G. Apostle & Lloyd P. Gerson, [Commentaries to] *Aristotle's Politics* 324 (1986) ("There were, however, properly judicial functions which were in the hands of the Assembly, and also deliberative matters which were in the hands of officials. The three parts – deliberative, judicial and official – are to be understood broadly."); Jack B. Weinstein, *Reform of Court Rule-Making Procedures* 53-54 (1977) ("There has never been a fully compartmentalized separation of powers. . . . The rule-making power is one of the most important examples of practical necessity dictating that a twilight area be created where activities of the branches merge.").

Policy considerations cannot, however override the Eleventh Amendment's flat prohibition of suits by private individuals against a state. In this context, the line between what is constitutionally permissible and what is not, is fairly clearly demarcated. The Eleventh Amendment prohibition is more analogous to the sharp age requirement of the presidency than it is to the vague standards of due process. Conflict with the constitutional principles embodied in the clear Eleventh Amendment doctrine as well as adverse practical federalism implications, provide a particularly powerful argument for declaring the False Claims Act's *qui tam* provisions as applied to states unconstitutional.

1. Article II

By authorizing private individuals to conduct litigation on the government's behalf the FCA's *qui tam* procedures may violate the Appointments Clause of Article II of the Constitution, and may interfere with the President's explicitly stated constitutional duty to take care that the laws be faithfully executed. In *Freytag v. Commissioner of Internal Revenue Service*, 501 U.S. 868 (1991), the Supreme Court stated that "[its] separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch." *Id.* at 878. The Court explained: "The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Id.* (emphasis added). The FCA arguably creates just such a diffusion of power by

inviting private parties to prosecute suits on behalf of the national government to enforce United States policy, a function which may only constitutionally be performed by properly appointed officers of the United States under Article II. Moreover, FCA suits by *qui tam* relators may well "interfere impermissibly with [the President's] constitutional obligation to ensure the faithful execution of the laws," *Morrison v. Olson*, 487 U.S. 654, 693 (1988), by permitting relators' suits to go forward even where the government determines that the case merits neither a civil proceeding nor a criminal prosecution and by giving relators too much control over the conduct of the litigation in cases where the government declines to intervene. See generally, James T. Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provisions*, 16 Harv. J.L. & Pub. Pol'y 701 (1993).

2. Article III

Notwithstanding Second Circuit case law holding that a private relator has standing sufficient to comply with Article III in an action against a private party, see *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993), there remains some doubt whether a relator, who has no claim other than for a legal fee and compensation for bringing the action, has suffered the pre-suit "injury in fact" constitutionally required by Article III. Such an "injury in fact" must be to a pre-existing legally protected interest of the plaintiff "which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). Particularized "mean[s] that the injury must affect the plaintiff in a personal and individual way." *Id.* at n.1.

Before a *qui tam* suit is started a relator's injury is no greater than that of any taxpayer. Commencing the suit arguably should not be deemed a substitute for the already choate personalized "injury in fact" that is required for standing. See James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provisions*, 16 Harv. J.L. & Pub. Pol'y 701, 714 (1993) (taxpayer injury insufficient for standing "is virtually indistinguishable from that suffered by FCA *qui tam* relators when their tax dollars go to fraudulent defense contractors"); see also *Diamond v. Charles*, 476 U.S. 54, 69-70 (1986) (attorney's fees do not provide a sufficient stake in the litigation to confer standing). Compare *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261, 1268 (S.D. Tex. 1997) (*qui tam* plaintiff suffered no injury-in-fact as required by Article III and thus lacked standing) with *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) (standing justified on the theory that FCA's *qui tam* provisions operate "as an enforceable unilateral contract").

IV. APPLICATION OF LAW TO FACTS

A. Relator's Private Interest

1. Real Party in Interest

Assuming that under *Kreindler* alleged injury to the Government is sufficient to confer standing on a private

relator, it is apparent that the United States is not the *only* real party in interest in this case. If the *qui tam* relator has standing on his own behalf, he must *ipso facto* be considered a real party in interest. See *Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1992), *cert. denied*, 508 U.S. 973 (1993) ("The *qui tam* plaintiff has the requisite personal stake in the outcome of the case to assure 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends.' " (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))). As a constructive private party plaintiff, he should be barred from suing a state for money damages in a federal court under the Eleventh Amendment. See *Hans v. Louisiana*, 134 U.S. 1 (1890).

Dubious is the suggestion that the relator simply "stands in the shoes of the government." *Kreindler*, 985 F.2d at 1154. As the definition of *qui tam* itself suggests, the interests the relator asserts in bringing suit under the FCA are very much his own as well as the government's. "*Qui tam*" is short for "*qui tam pro domino rege quam pro si ipso in hac parte sequitur*" which means "Who sues on behalf of the King as well as for himself." See, e.g., Black's Law Dictionary 1190 (3d ed. 1969) (emphasis added).

A keen personal interest and pursuit of his own welfare on the part of the relator is a prerequisite for the successful functioning of the *qui tam* enforcement mechanism. The FCA was enacted in 1863 in an effort to stop the rampant fraud being perpetrated on the United States government by private Civil War defense contractors. See *United States v. Bornstein*, 423 U.S. 303, 309 (1976); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547, 551-52 (1943); see also James T. Blanch, *The Constitutionality of the*

False Claims Act's Qui Tam Provisions, 16 Harv. J.L. & Pub. Pol'y 701, 705 n.17 (1993) (" 'For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.' " (quoting 1 F. Shannon, *The Organization and Administration of the Union Army, 1861-1865*, at 58 (1965) (quoting Tomes, *Fortunes of War*, 29 Harpers Monthly 228 (1864)))).

The Act established a dual enforcement mechanism, vesting primary responsibility for the investigation of violations in the Attorney General, but providing in addition for "*qui tam*" suits by private citizens on behalf of the United States for a portion of the proceeds of the action. See Act of March 2, 1863, 12 Stat. 696. These suits were designed to serve as an incentive for those who had previously engaged in fraudulent conduct to come forward and turn in their confederates. In the words of Senator Howard, the FCA's sponsor, "I have based [the provisions] on the old fashioned idea of holding out a temptation, and 'setting a rouge to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice." See Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863), quoted in *Issues and Developments in Qui Tam Suits, in Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy* 119, 121 (1996). As the Supreme Court recently emphasized:

[*Qui tam* statutes are] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most

effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by *private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain*. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

Hughes Aircraft Co. v. United States ex rel. Schumer, 117 S.Ct. 1871, 1877 (1997) (internal quotation marks and citations omitted) (emphasis added).

The hope of gain held out to FCA *qui tam* relators is substantial. In 1986, motivated by widespread defense contracting fraud, Congress amended the Act to make *qui tam* suits both easier to bring and more financially lucrative. See John Phillips & Janet Goldstein, *The False Claims Act in Practice* 456 PLI/Lit 469, 474-79 (1993).

Under the current version of the FCA, recovery by the government is for (1) a civil penalty of not less than \$5000, and not more than \$10,000, and (2) treble damages. See 31 U.S.C. § 3729(a). If the government chooses not to join in the action, as occurs in approximately 75 percent of cases filed, see Stuart M. Gerson, *Issues and Developments in Qui Tam Suits*, in *Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy* 119, 140 (1996), the relator stands to receive as much as 30 percent of the proceeds of the action or settlement in addition to reimbursement for reasonable expenses, attorneys' fees and costs. See 31 U.S.C. 1330(d)(1). Where the government does intervene, the relator may still be awarded up to 25% of the proceeds. See 31 U.S.C. 1330(d)(2).

Federal *qui tam* suits have recently increased in both size and number. See Stuart M. Gerson, *Issues and Developments in Qui Tam Suits under the False Claims Act*, in *Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy* 119, 119 (National Legal Center for the Public Interest 1996). In the twelve years since the FCA Amendments' enactment, *qui tam* relators have earned approximately \$244 million dollars. See Emily Barker, *The Whistleblower Wanted More*, *American Lawyer*, Sept. 1998, at 82, 85; see also Harvey Berkman, *Spoils to Bounty Hunters, Federal Contractors Gripe*, *Nat'l L.J.*, March 4, 1996, at B1 ("The bounty has worked. To date, 153 relators have collected \$188 million."); John Phillips & Janet Goldstein, 456 PLI/Lit 469, 473 (1993) ("Since the 1986 amendments were adopted, individuals have filed approximately 500 cases under the Act in federal courts around the country.").

Rewards in the tens of millions have been reported in a single suit. See, e.g., Berkman, *Nat'l L.J.*, March 4, 1996, at B1. The potential for huge recoveries has spawned the growth of a "*qui tam* bar" and a shift in emphasis from defense-contract cases to healthcare related ones involving fraudulent claims submitted to the Medicare and Medicaid programs. See, e.g., David J. Ryan, *The False Claims Act: An Old Weapon with New Firepower is Aimed at Healthcare Fraud*, 4 *Annals Health L.* 127 (1995); Kurt Eichenwald, *Health Industry Seeks Congressional Relief*, *N.Y. Times*, March 31, 1998, at D6.

Qui tam plaintiffs' personal stake in the outcome of the litigation is independent of the interests of the United States. "As a class of plaintiffs," the Supreme Court has observed, "*qui tam* relators are different in kind than the

Government. They are motivated primarily by prospects of monetary reward rather than the public good. . . . [They] are . . . less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S.Ct. 1871, 1877 (1997).

The relator's and the Government's interests are sometimes in sharp conflict. The facts of *United States ex rel. Sequoia Orange Co. v. Strathmore Packing House Co.*, 151 F.3d 1139 (9th Cir. 1998), provide an example. The relators in that case were an orange processor and an orange grower who sued members of the citrus industry over alleged false statements made to the government in connection with a citrus marketing program. The United States, having concluded that the marketing program was unnecessarily divisive and should be abandoned, was forced to intervene in the action to have it dismissed over the relators' objections. See Emily Barker, *The Whistleblower Wanted More*, *The American Lawyer*, Sept. 1998, at 82 (detailing dispute between *qui tam* relator and federal government over size of relator's portion of \$325 million settlement).

2. Statutory Protections

Analysis of the language and structure of the False Claims Act confirms the view that the *qui tam* relator has a personal stake in a suit once begun, and that this stake is akin to a property right. Section 3730(b)(1) of the Act states that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States

Government." 31 U.S.C. § 3730(b)(1) (emphasis added). According to the plain language of the statute, then, the relator's suit is brought partly on his own behalf.

While section 3730(b)(1) provides that "[t]he action shall be brought in the name of the Government," *id.* (emphasis added), other provisions of the Act make it clear that once the suit is commenced, the "name" of the action is the only thing which belongs exclusively to the United States. For example, the relator may press the litigation without the approval of the government should it decide not to intervene. See 31 U.S.C. § 3730(c)(3). Moreover, the protective language of section 3730(c)(3) permits the government subsequently to intervene in the action, not as a matter of right, but only "upon a showing of good cause" and "without limiting the status and rights of the person initiating the action." 31 U.S.C. § 3730(c)(3).

If the government does decide to intervene at the outset and assumes responsibility for prosecuting pursuant to section 3730(c)(1), the relator has the right to continue as a party. The government may not dismiss the suit without notifying the relator and affording him a hearing. See 31 U.S.C. § 3730(c)(1), (2)(A).

Neither may the United States settle the suit without a hearing in which the court must determine that the proposed settlement is "fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B). At that hearing the court must take into account the needs of the relator and his counsel. See *United States ex rel. Burr v. Blue Cross and Blue Shield of Florida, Inc.* 882 F. Supp. 166, 167, 170 (M.D. Fla. 1995); *United States ex rel. McCoy v.*

California Med. Review, Inc., 133 F.R.D. 143, 148-49 (N.D. Cal. 1990); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1428, 1459, 1461 (E.D.N.Y. 1989), *rev'd on other grounds*, 907 F.2d 1295 (1990).

The government's inability to settle a *qui tam* action without the approval of the court may result in the continued prosecution of the suit by a relator, even when this runs counter to the government's interest – and the will of the states' congressional representatives. See, e.g., William P. Barr, Assistant Attorney General, Office of Legal Counsel, *Memorandum to Dick Thornburgh, Attorney General, Re: Constitutionality of the Qui Tam Provisions of the False Claims Act*, reprinted in *Citizen Suits and Qui Tam actions: Private Enforcement of Public Policy* 161, 172-73 (National Legal Center for the Public Interest 1996) (discussing case in which *qui tam* provisions permitted a relator to force a suit that the Department of Justice would have chosen not to pursue if the exercise of its prosecutorial discretion had not been undermined).

The government is also prohibited from restricting the relator's right to participate in the case, for example by placing limitations on the number of witnesses and the length of their testimony, unless it satisfies the court that unlimited participation by the relator "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." 31 U.S.C. § 3730(c)(2)(C). This adherence to the fundamental due process rights of notice and an opportunity to be heard confers on the *qui tam* relator a vested interest in the nature of a property right once the suit is commenced.

In sum, as both the rationale for the adoption of the FCA's *qui tam* provisions, and the provisions themselves demonstrate, once the standing issue is hurdled private plaintiffs bringing suit under the Act are vindicating interests of their own as well as of the government. The fact that the relator is joined with the government does not provide warrant for circumventing the constitutional barrier to an individual's suits against a state.

B. *Qui Tam* Suits Measured Against Eleventh Amendment

As a private party in interest suing a state for money damages, the relator can only be permitted to press his suit if he can establish Congress' clear intent under the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity. *Seminole Tribe*, 517 U.S. 44, 65-66. See discussion Part III.A.1.c. *supra*. This a *qui tam* plaintiff cannot do.

First, the language of the False Claims Act mentions neither the states' sovereign immunity nor the Eleventh or Fourteenth Amendments. The Act provides only that "[a]ny person" is subject to liability. 31 U.S.C. § 3729(a). The Supreme Court has repeatedly held that such general authorizations for suit in federal court are insufficient to abrogate the protections of the Eleventh Amendment. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985); see also *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) ("[I]mperfect confidence will not suffice given the special constitutional concerns in this area. . . .").

Even if Congress had made its intent to abrogate the states' immunity from private suit unmistakable in the

language of the Act, this clear expression would fall short of overriding the Eleventh Amendment. The only authority recognized by the Supreme Court as a basis for abrogating state sovereign immunity is Section 5 of the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. 44, 59-66; *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 148 F.3d 1343, 1348 (Fed. Cir. 1998). The Fourteenth Amendment deals with such matters as civil rights and equal protection. It has never been put forward as support for the kind of *qui tam* action authorized by the FCA. Rather, the FCA was enacted under Article I of the Constitution. As the Court made clear in *Seminole Tribe*, "Article I cannot be used to circumvent the constitutional limits placed on federal jurisdiction." *Seminole Tribe*, 517 U.S. 44, 73.

Nor may the relator seek to bypass the requirements of the Eleventh Amendment by cloaking himself in the federal government's power to sue a state. As noted above, see Part III.A.2.b., *supra*, this exception is a narrow one. It does not carry over to the relator's suit simply by virtue of the fact that he is deemed a substitute for the United States for standing purposes. The theory that the *qui tam* relator has somehow been "deputized" as an agent of the United States through the language of the FCA ignores the fact that the relator does not sue under the auspices and control of the United States, but exercises his own statutory right to bring suit, see 31 U.S.C. § 3730(c)(1), (3), a right which is afforded procedural protections by specific provisions of the FCA.

While the notion of a *qui tam* relator "standing in the shoes of" the United States may be sufficient to confer standing, it is not sufficient to effect a transfer of the

federal government's exemption from state sovereign immunity. The government may be entitled to assign its *claim* to a relator, but its power to sue a state in federal court is nontransferable.

C. Frustration of Appropriate Federal Dynamics

Allowing private *qui tam* plaintiffs to sue a state impedes the successful functioning of our federal system. The federal government's decision to sue a state is a weighty one, requiring consideration not only of the suit's impact on federal-state relations and the taxpayers of the target state, but also its true cost to all United States citizens in terms of the allocation of scarce public resources. In such a context, the targeted state's congresspersons can often fulfill their representative role by using their influence with federal authorities to settle or dismiss the suit. The state's administrators must also have an opportunity to negotiate a resolution with their federal counterparts. Entrusting the United States' decision to sue a state to a *qui tam* relator, with an incentive to sue even when the merits of the suit are questionable, and even though its prosecution harms the interests of the federal government, the state, and the ongoing relationship between the two sovereigns, effectively short circuits the moderating processes afforded congresspersons and state and federal administrators.

1. National Political Process

Local interests make themselves felt at all stages of the national political process. The election of senators and

representatives from the states ensures the states' influential position as "strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546 (1954); see also, Larry Kramer, *Understanding Federalism* 47 Vand. L. Rev. 1485, 1547 (1994) ("The simple existence of independent states within the larger nation affects the dynamic of American politics . . . by encouraging political movements to develop along state lines and to utilize the machinery of state government to achieve their goals."). Individual congresspersons' voting decisions are influenced by the preferences of their constituents and by the needs of their home states as well as by national interests. See generally, John W. Kingdon, *Congressmen's Voting Decisions* 29-71 (3d ed. 1973); Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 Am.Pol.Sci.Rev. 45 (1963).

Members of Congress, in their individual capacity and as members of congressional committees, frequently intervene on behalf of their states and home communities to influence the policy positions and particular decisions of administrative agencies charged with implementing federal statutes. See generally Christopher J. Deering & Steven S. Smith, *Committees in Congress*, 50 123 (3d ed. 1997); David E. Price, *Congressional Committees in the Policy Process*, in *Congress Reconsidered* 156 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981); John A. Ferejohn & Charles R. Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. Econ. & Org. 1 (1990).

The often-used process by which federal representatives seek to influence the administrative discretion of the executive branch on behalf of their constituents, sometimes described as "casework," has become an integral part of American federalism. See John R. Johannes, *To Serve the People: Congress and Constituency Service* 4-5 (1984); T. Edward Westen, *The Constituent Needs Help: Casework in the House of Representatives*, in *To Be a Congressman: The Promise and the Power* 53, 54 (Sven Groennings & Jonathon P. Hawley eds., 1973) ("Casework is an indispensable function of a congressman."); Kenneth E. Gray, *Congressional Interference in Administration*, in *Cooperation and Conflict: Readings in American Federalism* 521, 521 (Daniel J. Elazar et al. eds., 1969) ("[I]nterference in administration on behalf of individuals, associations and state and local governments is a key characteristic of American federalism. . . .").

Congresspersons perform "casework" on behalf of both individuals and private groups. See generally Kenneth E. Gray, *Congressional Interference in Administration*, in *Cooperation and Conflict: Readings in American Federalism* 521, 523-540 (Daniel J. Elazar et al. eds., 1969). Requests for congressional intervention by industry groups and state or local governments are sometimes referred to as "high level" casework. See John R. Johannes, *To Serve the People: Congress and Constituency Service* 18 (1984); T. Edward Westen, *The Constituent Needs Help: Casework in the House of Representatives*, in *To Be a Congressman: The Promise and the Power* 53, 68 (Sven Groennings & Jonathon P. Hawley eds., 1973). In point of fact this "high level casework" is often, most importantly, conducted on

behalf of state and municipal governments and their officials. These relationships are vital to the effective functioning of our interrelated layers of government. Congressional interventions in federal-state relationships often involve a more politically sophisticated portion of the constituency, affect larger numbers of people than casework requests by individuals, and are frequently given more personal attention by congresspersons and their staffs. Thus, "the kind of political delicacy that is needed in handling these problems requires that the person working with the cases be able to see policy implications and react to political realities." *Id.* at 70.

From the point of view of state and local governments, "casework" is "a most useful device for gaining administrative consideration for state and local needs after legislation has been enacted and at the point where administrative discretion in statutory interpretation comes into play." Daniel J. Elazar, *American Federalism: A View from the States* 179 (3d ed. 1984). The dependence of administrative agencies on members of Congress for funding and the approval of proposed legislation operates to the states' advantage and gives congresspersons great leverage. See Larry Kramer, *Understanding Federalism* 47 Vand. L. Rev. 1485, 1546 (1994) ("[F]ederal bureaucrats recognize the need to avoid alienating members of Congress, whose support they may need in the future, and this provides a significant degree of practical control."). Federal administrators, aware that future congressional support can hinge more on their ability to serve the interests of congresspersons and their constituents than on the details of a given program, can be very responsive to congresspersons' requests for intervention. See Daniel

J. Elazar, *American Federalism: A View from the States* 179 (3d ed. 1984).

Congressional work on behalf of the home state and municipal interests plays a critical role in preserving the federal-state balance by "keeping the bureaucracy accountable and open to all the people and preserving decentralization of power in the American Federal System." Kenneth E. Gray, *Congressional Interference in Administration, in Cooperation and Conflict: Readings in American Federalism* 521, 542 (Daniel J. Elazar et al. eds., 1969).

The federal administrators whose help is enlisted by congressional representatives for the purpose of preventing or facilitating administrative action gain influence from the process. Not only are potential mistakes avoided, but a *quid pro quo* relationship develops between congressional representatives and the administrative agencies they seek to influence. See Kenneth E. Gray, *Congressional Interference in Administration, in Cooperation and Conflict: Readings in American Federalism* 521, 541 (Daniel J. Elazar et al. eds., 1969) ("A favorable impression of an agency's responsiveness may enlist a valuable congressional ally. Favors done for congressmen may provide a receptive congressional ear to hear the agency's point of view in Congress.").

2. Cooperative Relations Between Federal and State Administrative Agencies

The cooperative relationship that exists between the states and the federal government for the purpose of enforcing federal environmental laws has been described

as one of "cooperative federalism." *New York v. United States*, 505 U.S. 144, 167 (1992); see also Karol L. Kahalley, *State Sovereignty - Back to the Future: The Supreme Court Reaffirms State Sovereignty in Cooperative Federalism Solutions to Environmental Problems*. *New York v. United States*, 112 S.Ct. 2408 (1992), 29 Land & Water L. Rev. 117, 135 (1994). Under this scheme, federal environmental legislation and agency regulations set forth general policies and procedures which are designed for implementation and enforcement at the state level. See Alfred R. Light, *He Who Pays the Piper Should Call the Tune: Dual Sovereignty in U.S. Environmental Law*, 4 *Envtl. Law* 779, 782 (1998). The system presupposes both a "national consensus . . . as to the goals and objectives of environmental quality," and "a willingness on the part of states to be partners in the national enterprise." *Id.*; see also *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters'" (quoting 33 U.S.C. § 1251(a)).

The collaborative spirit which animates this sort of program has been aptly described:

Uppermost in the attitudes of most federal and state officials involved in the cooperative programs is the sense of partnership in a common endeavor. This means that a federal official from a regional office charged with ensuring state compliance with federal regulations does not visit his state counterpart as an inspector but as a *cooperator* (the term is commonly used in the federal agencies).

Daniel J. Elazar, *American Federalism: A View from the States* 182 (3d ed. 1984).

Federal officials have ample means at their disposal to ensure state agencies' compliance with federal standards. Reporting requirements and public records requests as well as constant monitoring, audits and reauthorizations combine to ensure the federal government access to the state agencies' records and operations. Moreover, where a state agency falls short of federal requirements, the federal bureaucracy often has the option of either withholding individual payments or cutting off funds altogether. See Karol L. Kahalley, *State Sovereignty - Back to the Future: The Supreme Court Reaffirms State Sovereignty in Cooperative Federalism Solutions to Environmental Problems*. *New York v. United States*, 112 S.Ct. 2408 (1992), 29 Land & Water L. Rev. 117, 135-36 (1994) ("The federal government generally reserves the right to withdraw administration of these programs from states not meeting federal standards."). For example, if the recipient of a federal grant fails to comply with the terms of an award, the Environmental Protection Agency ("EPA") may withhold cash payment, disallow all or part of the cost of the program, suspend or terminate the award, or withhold further awards, among other remedies. 40 C.F.R. §§ 31.43, 31.51 (1996). Recipients of EPA grants must submit performance reports and financial reports to ensure compliance with federal awards. *Id.* §§ 31.40, 31.41. Under the Clean Water Act, the EPA is further required to evaluate recipient performance, *id.* § 35.150, and may reduce the amount of federal assistance if a recipient fails to meet performance standards. *Id.* § 35.43(b); see also 42 U.S.C. § 6926(e) (The Resource

Recovery and Conservation Act) ("[w]henver the Administrator determines . . . that a State is not administering and enforcing a program . . . in accordance with requirements of this section, he shall so notify a State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of this program and establish a Federal program. . . ."). Use of extreme measures by the federal bureaucracy to penalize a state is infrequent because of the realities of politics, and the need to avoid disaffection with federal officials.

Because the federal authorities are hesitant about using harsh methods that might end or seriously weaken programs they are anxious to see maintained, the use of these formal mechanisms is avoided where possible through an emphasis on informal devices of consultation and persuasion. Federal officials seek cooperative compliance on the part of the states through such methods, knowing that such compliance is more effective in the long run. To develop this atmosphere of cooperation, they are prepared to make concessions to their state counterparts. In essence, formal mechanisms are used only as a last resort.

Daniel J. Elazar, *American Federalism: A View from the States* 182 (3d ed. 1984).

State administrators cooperating with the federal bureaucracy are normally granted substantial flexibility with regard to program implementation. *See id.* at 184. Even when federal administrators require strict adherence to formal procedures,

their state counterparts are frequently able to avoid further investigation by submitting the requisite formal documents applying for funds and accounting for their use in the approved manner. If the documents meet the requirements, no further investigations are conducted. The state agencies then go their own way in actually using the funds, having "bought" freedom from real supervision. As a general rule, the better established a program is, the less likely it is that federal administrators will exercise the supervisory powers that are legally theirs.

Id.

The important role played by these cooperative relationships in maintaining the federal-state balance should not be underestimated. *See, e.g., id.* at 3 (3d ed. 1984) ("[f]ederalism is more than an arrangement of governmental structures; it is a mode of political activity that requires the extension of certain kinds of cooperative relationships throughout any political system it animates."); Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1543 (1994) (federal-state administrative structure "plays an important, and underappreciated, supporting role in federalism"). Dependence of the federal government on the states for the implementation and enforcement of whole bodies of federal law ensures that state institutions will be able to exert influence:

The federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the process. Not necessarily an equal voice: because federal law is supreme and Congress holds the purse strings, the federal government is bound

to prevail if push comes to shove. But federal dependency on state administrators gives federal officials an incentive to see that push doesn't come to shove, or at least that this happens as seldom as possible, and that means taking state interests into account.

Id. at 1544.

3. Interference with Federal Government's Discretion to Sue or Refrain from Suing a State as a Distortion of Our Federal System

Given the implications of a government suit against a state, the full freedom of congressional representatives to attempt to resolve the underlying dispute is of critical importance. In a *qui tam* suit against a state, however, congressional representatives are prevented from using their influence by specific provisions of the False Claims Act.

During the first phase of a *qui tam* action, the complaint remains under seal for sixty days while the government decides whether or not to intervene. *See* 31 U.S.C. § 3730(b)(2). Unless officials of the targeted state somehow learn of the initiation of a lawsuit during this period and communicate their knowledge to the state's federal representatives, congressional interference at this stage will not be possible.

Should the government decide not to intervene in the relator's suit during this period, its loss of control over the litigation will make it difficult, if not impossible, to respond to pressure from congressional representatives seeking settlement or dismissal of the suit. The provisions

of the Act which protect the relator's interest in the litigation ensure that congresspersons' efforts on behalf of their state will have little practical effect. Even where the government agrees that the suit should be dismissed, it must establish "good cause" for subsequent intervention in an action it has initially chosen not to pursue. *See* 31 U.S.C. § 3730(c)(3). As noted in Part IV.A.2., *supra*, section 3730(c)(2)(A) requires that the *qui tam* relator be given notice and a hearing before the case can be dismissed, and section 3730(c)(2)(B) provides that the government may settle a suit only "if the court determines after a hearing, that the proposed settlement is fair, adequate and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B). It is also worth noting that, even where the United States surmounts the "good cause" hurdle and succeeds in settling the suit or having it dismissed, a substantial amount of damage will already have been done. Not only will the state have been subjected to suit in federal court at the hands of a private citizen, it will, in all likelihood, have expended considerable amounts of public money in defending a possibly meritless lawsuit. Either way, the result will be a violation of both the Eleventh Amendment and the spirit of our federalism which it embodies.

In the instant case, the relator's suit remained under seal for over a year. During that period the time for the action to remain secret had been repeatedly extended. From the initiation of this action until almost the present time, Vermont's federal representatives were presumably either in the dark as to the existence of the action, or, if not, prevented by the structure of the Act from bringing their full political influence to bear on the controversy.

That is an especially dangerous state of affairs from the point of view of our federal system.

The destructive potential of this type of litigation with regard to the cooperative relationship between state agencies and their federal counterparts should also be apparent. The relator's ~~suit~~ challenging the accounting procedures used by Vermont's Department of Environmental Conservation ("DEC") to draw down federal grants from the EPA drives a wedge between the two agencies, inhibiting a productive, collaborative partnership, generating suspicion and turning what should be a cooperative relationship into a strained and awkward one. Disputes like this one, which involve a difference of interpretation with regard to proper accounting practice, are particularly amenable to congressional legislative resolution or mediation by congresspersons. What may be an effective formal mechanism for policing the adversarial relationship between the government and a defense contractor or private health agency filing a claim for payment can destroy a constitutionally appropriate collaborative interaction between the federal government and a state acting in concert to implement the nation's environmental or other statutes. In this case, the United States had extensive access to DEC records and ample means with which to procure the DEC's compliance had it been dissatisfied with the agency's accounting procedures, or with any other aspect of its performance.

In short, the government's lack of full control over the course of the litigation undermines the ability of federal congressional representatives – and of governors, mayors and other local representatives as well – to use

the legitimate political process of our federalism to influence the discretionary decisions of the Executive Branch in favor of state interests. The result is the frustration of the complex and sophisticated process of influence and negotiation that plays an integral part in the work of our current federal system. Limited too, are the opportunities for state administrative agencies effectively to assert state interests in the labyrinthine corridors of the federal bureaucracy. The serious distortion of the dynamics of our federal system raises concerns similar to those which led the Supreme Court to invalidate the legislation at issue in *Printz v. United States*, 117 S.Ct. 2365 (1997) and *New York v. United States*, 505 U.S. 144 (1992). Here, as in those cases, "the Constitution protects us from our own best intentions." *Id.* at 187.

V. CONCLUSION

Because the False Claims Act fails plainly to state Congress' design under the Fourteenth Amendment to abrogate the states' sovereign immunity, because destruction of the states' sovereign immunity by the *qui tam* provisions of the False Claims Act unnecessarily upsets a cooperative process essential to American federalism, and because Appellee's suit against the State of Vermont is barred by the Eleventh Amendment, this *qui tam* action against the State of Vermont should be dismissed. However rational and desirable this form of *qui tam* action may be to protect the federal fisc, it is barred by the Constitution.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

UNITED STATES OF :
AMERICA ex rel. Jonathan :
Stevens, :
v. : Civil No. 1:95CV161
STATE OF VERMONT, :
AGENCY OF NATURAL :
RESOURCES :

RULING ON MOTION TO DISMISS
(paper 37)

(Filed May 9, 1997)

The relator in this *qui tam* action pursuant to the False Claims Act, 31 U.S.C. § 3730(b) alleges the State of Vermont Agency of Natural Resources (hereinafter "the State") has falsified activity reports to qualify for a maximum amount of federal grant money. The State has moved to dismiss this action on the ground that it is entitled to Eleventh Amendment immunity and is otherwise not a "person" subject to suit within the meaning of the False Claims Act.

The Court rejects the State's arguments. The majority of courts which have considered the issue have concluded that the Eleventh Amendment does not bar suits such as the instant one because the United States, which has the ability to sue a state, is the real party in interest and ultimately the primary beneficiary of a successful *qui tam* action. See, e.g., *United States ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453, 1457-58

(4th Cir. 1997); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir.), cert. denied, 508 U.S. 973 (1993); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48-50 (4th Cir. 1992); *Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990). Furthermore, under these circumstances, it would be anomalous to acknowledge that a state is a "person" within the meaning of the statute if it chooses to bring a False Claims Act suit, but that the same state is not a "person" if named as a defendant. See *Commissioner v. Lundy*, 116 S.Ct. 647, 655 (1996) (As a matter of statutory construction, identical words used in different parts of the same act should be afforded the same meaning.); *United States ex rel. Woodard and State of Colorado v. Country View Care Center, Inc.*, 797 F.2d 888 (10th Cir. 1986) (*qui tam* suit instituted by the State of Colorado).

The Motion to Dismiss is DENIED.

SO ORDERED.

Dated at Rutland, Vermont, this 9th day of May, 1997.

/s/ J. Garvan Murtha
J. Garvan Murtha
Chief Judge

App. 88

THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF VERMONT

THE UNITED STATES OF)	
AMERICA, ex rel)	
Jonathan H. Stevens,)	Civil Action
)	No. 1:95-CV-161
Relator,)	
)	
v.)	
)	
THE STATE OF)	
VERMONT, AGENCY OF)	
NATURAL RESOURCES,)	
)	
Defendant.)	

Motion for reconsideration is GRANTED.

/s/ J. Garvan Murtha
J. Garvan Murtha,
Chief Judge

App. 89

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13 day of April one thousand nine hundred and ninety-nine.

USA

v

State of VT

Dkt No: 97-6141

(Filed April 13, 1999)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant State of Vermont.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the

appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL,
Clerk

By: /s/ Beth J. Meador,
Beth J. Meador,
Administrative Attorney

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733:

31 U.S.C. § 3729. False claims

(a) **Liability for certain acts.** – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property

than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that -

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined.** - For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information -

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) **Claim defined.** - For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee,

or other recipient for any portion of the money or property which is requested or demanded.

(d) **Exemption from disclosure.** – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **Exclusion.** – This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C. § 3730. Civil actions for false claims

(a) **Responsibilities of the attorney general.** – The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **Actions by private persons.** – (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the

person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. [FN1] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) **Rights of the parties to Qui Tam actions.** – (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

- (i) limiting the number of witnesses the person may call;
- (ii) limiting the length of the testimony of such witnesses;
- (iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with

the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) **Award to Qui Tam plaintiff.** - (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government

Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or

(2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) **Certain actions barred.** - (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed

in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) **Government not liable for certain expenses.** - The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) **Fees and expenses to prevailing defendant.** - In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3731. False claims procedure

(a) A subpoena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought -

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3732. False claims jurisdiction

(a) **Actions under section 3730.** - Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts

business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) **Claims under state law.** – The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

31 U.S.C. § 3733. Civil investigative demands

(a) In general. –

(1) **Issuance and service.** – Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person –

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines. –

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall –

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a

reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall -

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall -

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is

necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) **Protected material or information.** -

(1) **In general.** - A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under -

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) **Effect on other orders, rules, and laws.** - Any such demand which is an express demand for any product of discovery supercedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or

privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) **Service; jurisdiction.** -

(1) **By whom served.** - Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) **Service in foreign countries.** - Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) **Service upon legal entities and natural persons.** -

(1) **Legal entities.** - Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by -

(A) delivering an executed copy of such demand or petition to any partner,

executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) **Natural persons.** – Service of any such demand or petition may be made upon any natural person by –

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) **Proof of service.** – A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered

or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) **Documentary material.** –

(1) **Sworn certificates.** – The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by –

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) **Production of materials.** – Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on

such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) **Interrogatories.** – Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by –

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) **Oral examinations.** –

(1) **Procedures.** – The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the

examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) **Persons present.** – The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) **Where testimony taken.** – The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) **Transcript of testimony.** – When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) **Certification and delivery to custodian.** – The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) **Furnishing or inspection of transcript by witness.** – Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the

witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) **Conduct of oral testimony.** – (A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) **Witness fees and allowances.** – Any person appearing for oral testimony under a

civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts. -

(1) Designation. - The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure. - (A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law

investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe -

(i) documentary material and answers to interrogatories shall be available for

examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) **Use of material, answers, or transcripts in other proceedings.** – Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) **Conditions for return of material.** – If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and –

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any

Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) **Appointment of successor custodians.** – In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly –

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or

testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings. -

(1) Petition for enforcement. - Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand. - (A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition

addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed -

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery. - (A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United

States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed –

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) **Petition to require performance by custodian of duties.** – At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery,

the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) **Jurisdiction.** – Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) **Applicability of federal rules of civil procedure.** – The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) **Disclosure exemption.** – Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) **Definitions.** – For purposes of this section –

(1) the term “false claims law” means –

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes -

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

No. 98-1828

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Supreme Court, U.S.
FILED

MAY 26 1999

In the Supreme Court of the United States

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,
PETITIONER

v.

UNITED STATES OF AMERICA EX REL.
JONATHAN STEVENS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a State or state agency is a "person" subject to suit under the False Claims Act, 31 U.S.C. 3729 *et seq.*

2. Whether a *qui tam* suit against a State or state agency is barred by the Eleventh Amendment.

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In the Supreme Court of the United States

No. 98-1828

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,
PETITIONER

v.

UNITED STATES OF AMERICA EX REL.
JONATHAN STEVENS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-85) is reported at 162 F.3d 195. The opinion of the district court (Pet. App. 86-87) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1998. A petition for rehearing was denied on April 13, 1999. Pet. App. 89-90. The petition for a writ of certiorari was filed on May 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits any "person" from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). A "person" who violates the FCA "is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

For purposes of Section 3729, the term "person" is not defined. A different provision of the FCA authorizes the Attorney General to issue civil investigative demands (CIDs) compelling the production of evidence. 31 U.S.C. 3733. A CID may be issued "[w]hensoever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation." 31 U.S.C. 3733(a)(1). For purposes of Section 3733, "the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." 31 U.S.C. 3733(l)(4).

A suit to collect the statutory penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. Section 3730(a) states that "[i]f the Attorney General finds that a person has violated or is violating

section 3729, the Attorney General may bring a civil action under this section against the person." Section 3730(b)(1) states that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government * * * in the name of the Government."

When a *qui tam* action is brought, the complaint is filed in camera and remains under seal for at least 60 days. 31 U.S.C. 3730(b)(2). The Act provides the government the opportunity to intervene in the suit "within 60 days after it receives both the complaint and the material evidence and information," *ibid.*, in which case the government "shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action." 31 U.S.C. 3730(c)(1). If the government does not intervene within the initial 60-day period, "the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). The Act further provides that an FCA suit "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. 3730(b)(1). If a *qui tam* action results in the recovery of civil penalties, those penalties are divided between the government and the relator.¹

¹ If the government takes control of the litigation, the relator shall, with limited exceptions, "receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim." 31 U.S.C. 3730(d)(1). If the government declines to take control of the litigation and the relator prosecutes the suit, the relator's share "shall be not less than 25 percent and not more than 30 percent of the proceeds." 31 U.S.C. 3730(d)(2).

2. The instant case involves a *qui tam* suit filed against petitioner State of Vermont Agency of Natural Resources. The relator, Jonathan Stevens (a respondent in this Court), was an employee of petitioner at the time of the alleged FCA violations. The complaint alleged that petitioner had submitted false claims to the United States Environmental Protection Agency (EPA) in connection with federal grant programs administered by the EPA pursuant to, *inter alia*, the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, and the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.* The gravamen of the suit was that petitioner had overstated the amount of time spent by its employees on the federally-funded projects, thereby inducing the EPA to pay grant money to which petitioner was not entitled. Pet. App. 5-7.

As required by the FCA, see 31 U.S.C. 3730(b)(2), the complaint in this case was filed in camera and under seal and was not served upon petitioner. Pet. App. 7. The United States declined to intervene to take over the action, and the complaint was subsequently unsealed and served. *Id.* at 7-8.² Petitioner moved to dismiss the action, arguing that (1) a State or state instrumentality is not a "person" subject to liability under the FCA, 31 U.S.C. 3729; and (2) *qui tam* suits against state entities are barred by the Eleventh Amendment. Pet. App. 8.

The district court denied the motion to dismiss. Pet. App. 86-87. The court held that "the Eleventh Amendment does not bar suits such as the instant one

² The United States is a party in this Court, however, because it intervened in the court of appeals pursuant to 28 U.S.C. 2403(a) to defend the *qui tam* provisions of the FCA against petitioner's constitutional challenge. See Pet. App. 9.

because the United States, which has the ability to sue a state, is the real party in interest and ultimately the primary beneficiary of a successful *qui tam* action." *Id.* at 86. The court also observed, with respect to the issue of statutory construction, that "it would be anomalous to acknowledge that a state is a 'person' within the meaning of the statute if it chooses to bring a False Claims Act suit, but that the same state is not a 'person' if named as a defendant." *Id.* at 87.

3. Petitioner filed an interlocutory appeal, and the court of appeals affirmed. Pet. App. 1-85.³

a. The court of appeals first held that the Eleventh Amendment does not bar a *qui tam* suit against a State or state agency. Pet. App. 14-18. The court observed that under established law, the Eleventh Amendment has no application to suits by the United States. *Id.* at 15-16. The court framed the relevant constitutional question as "whether a *qui tam* suit under the FCA should be viewed as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred." *Id.* at 16. In light of "[t]he interests to be vindicated, in combination with the government's ability to control the conduct and duration of the *qui tam* suit," the court of appeals concluded that the Eleventh Amendment does not bar *qui tam* actions against state defendants. *Ibid.*

³ As the court of appeals observed, this Court has held that a district court order denying a motion to dismiss based on a claim of Eleventh Amendment immunity is immediately appealable. See Pet. App. 9 (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993)). The court of appeals concluded that it possessed "pendent appellate jurisdiction" over the question "whether *qui tam* suits against the States are authorized by the Act." *Id.* at 19.

The court explained that in its view “[t]he real party in interest in a *qui tam* suit is the United States,” since a *qui tam* suit is intended to redress fraud against the United States and the bulk of any recovery goes to the government. Pet. App. 16. The court also observed that the government possesses substantial control over *qui tam* litigation, since it may intervene at the outset of the suit and retains significant prerogatives even if it does not intervene. *Id.* at 17. “In light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits,” the court held that a *qui tam* suit “is in essence a suit by the United States and hence is not barred by the Eleventh Amendment.” *Id.* at 18.

b. The court of appeals also held that petitioner is a “person” subject to the liability provision of the FCA, 31 U.S.C. 3729. Pet. App. 19-30. The court held that the interpretive question is not governed by any “plain statement” rule, explaining that “[t]he Act does not intrude into any area of traditional state power. The goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud. The States have no right or authority, traditional or otherwise, to engage in such conduct.” *Id.* at 20-21. The court observed that “[w]hether the term ‘person’ when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment.” *Id.* at 21 (quoting *Sims v. United States*, 359 U.S. 108, 112 (1959)). In the court of appeals’ view, several aspects of the FCA and its legislative history support the conclusion that a State or state agency is a “person” subject to liability under the Act. *Id.* at 21-30. The court explained, *inter alia*, that States have historically been regarded as “person[s]” authorized to

file *qui tam* actions under 31 U.S.C. 3730(b)(1), see Pet. App. 21-24; that the Act has been construed broadly as covering all frauds upon the United States, including frauds perpetrated by state officials, see *id.* at 25-28; and that the word “person” is defined to include States for purposes of 31 U.S.C. 3733, which governs the issuance of CIDs, see Pet. App. 28-29.

c. Senior District Judge Weinstein, sitting by designation on the court of appeals, dissented. The dissenting judge concluded that the suit was barred by the Eleventh Amendment. Pet. App. 31-85.

ARGUMENT

Although we believe that the decision of the court of appeals is correct, we agree with petitioner that the case warrants this Court’s review. The broad issue presented here is whether a private relator may prosecute a *qui tam* suit under the FCA against a State or a state agency. That issue encompasses two subsidiary questions. The first is whether, as a matter of statutory interpretation, a State or state agency is a “person” subject to liability under the FCA, 31 U.S.C. 3729. If so, the second question is whether the Eleventh Amendment bars the particular remedy of a private relator’s *qui tam* action against an unconsenting State.

As the petition for a writ of certiorari explains (Pet. 5-17), both the broad issue and each of the subsidiary questions are currently the subject of circuit conflicts. In the view of the United States, the instant case provides a good vehicle—and the best available—for resolution of those conflicts, which warrant this Court’s attention. The petition should therefore be granted.

1. Like the Second Circuit in the instant case, the Eighth Circuit has held both that a State is a “person” subject to liability under the FCA, 31 U.S.C. 3729, and

that the Eleventh Amendment does not bar *qui tam* suits against state defendants. See *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 872-875 (1998) (deciding statutory question); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 867-868 (1998) (deciding Eleventh Amendment question), petition for cert. pending, No. 98-1664 (filed Apr. 14, 1999). The Fourth and Ninth Circuits have rejected Eleventh Amendment challenges to such suits without squarely addressing the question whether a State is a "person" within the meaning of Section 3729. See *United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1457-1459 (4th Cir.), cert. denied, 522 U.S. 916 (1997); *United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 48-50 (4th Cir. 1992); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 962-963 (1994), vacated on other grounds, 72 F.3d 740 (9th Cir. 1995) (en banc), cert. denied, 517 U.S. 1233 (1996).

By contrast, two other courts of appeals have held that *qui tam* suits against state defendants are not permitted. The Fifth Circuit has held that such actions are barred by the Eleventh Amendment. See *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 283-288 (1999). The D.C. Circuit has held that a State or a state agency is not a "person" subject to liability under 31 U.S.C. 3729; the court did not resolve the Eleventh Amendment question, though its statutory analysis was heavily influenced by constitutional considerations. See *United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, No. 98-5133, 1999 WL 178713, at *2-*17 (Apr. 2, 1999), supplemental opinion, No. 98-5133, 1999 WL 252644 (Apr. 30, 1999). The fact that four different courts of appeals have addressed these issues within the past two months attests to the

recurring importance of the questions presented in this case. Review by this Court is warranted to resolve the existing conflicts in authority.

2. In addition to the petition in the instant case, the State of Arkansas's certiorari petition in *Arkansas v. United States ex rel. Rodgers*, No. 98-1664 (filed Apr. 14, 1999), is pending before this Court. That petition, however, is limited to the question whether private *qui tam* actions are barred by the Eleventh Amendment. See Pet. at i, *Arkansas, supra* (question presented); *Rodgers*, 154 F.3d at 867-868 (court of appeals' discussion limited to Eleventh Amendment issue).⁴ Resolution of that constitutional issue, standing alone, would leave unresolved the existing circuit conflict regarding the question whether a State is a "person" subject to liability under the FCA.

That issue of statutory construction will retain significance regardless of this Court's resolution of the Eleventh Amendment question. If the Eleventh Amendment does not preclude *qui tam* suits against state defendants, such actions can go forward if, but only if, a State is a "person" subject to liability under the Act. If the Eleventh Amendment *does* bar private *qui tam* actions against state defendants, resolution of the statutory question will remain important, since the alternative FCA remedy of a suit brought or taken over by the Attorney General is viable only if a State is a "person" under Section 3729. Because the petition in the instant case presents both the statutory and consti-

⁴ In an opinion issued the same day as its opinion in *Rodgers*, the Eighth Circuit held that a State or state agency is a "person" within the meaning of Section 3729. See *Zissler*, 154 F.3d at 872-875. *Zissler* was subsequently resolved through a monetary settlement, and pursuant to a stipulation among the parties the district court entered an order of dismissal.

tutional issues, it provides a better vehicle for resolution of the existing circuit conflicts than does the petition in No. 98-1664.⁵

⁵ It is not entirely clear that the statutory question was properly before the court of appeals. This case involves petitioner's interlocutory appeal from the district court's denial of its motion to dismiss. See Pet. App. 8-9. This Court has held that the denial of a motion to dismiss on Eleventh Amendment grounds is immediately appealable under the collateral order doctrine. See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993). In the instant case, the Second Circuit held that it possessed "pendent appellate jurisdiction" over the question whether *qui tam* suits against States are authorized by the FCA. Pet. App. 19; accord *Long*, 1999 WL 178713, at *2.

This Court has generally disapproved the concept of pendent appellate jurisdiction. See *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995). The Court has suggested, however, that the exercise of such jurisdiction might be proper under some circumstances, as where the appealable and non-appealable rulings are "inextricably intertwined," or where review of the "pendent" holding is "necessary to ensure meaningful review of the" ruling that is independently appealable. *Id.* at 50-51. Even assuming that the district court's denial of petitioner's motion to dismiss on statutory grounds is not independently subject to immediate appellate review, we believe that the statutory issue is logically antecedent to the Eleventh Amendment question, and that the court of appeals' exercise of pendent appellate jurisdiction was therefore proper. Indeed, it would contravene accepted principles of constitutional adjudication for this Court to determine whether the Eleventh Amendment bars the instant *qui tam* action without first deciding whether Congress has authorized such suits to be filed against state entities.

In any event, any uncertainty about reviewability of the statutory claim in this case affects equally all four cases that are currently ripe for review, as they are all state interlocutory appeals from district court denials of motions to dismiss. Compare *Rodgers*, 154 F.3d at 867; *Long*, 1999 WL 178713, at *2; *Foulds*, 171 F.3d at 283. Thus, because there are strong reasons to find

3. The court of appeals correctly decided the statutory and constitutional issues presented by this case.

a. "Whether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Sims v. United States*, 359 U.S. 108, 112 (1959) (quoted at Pet. App. 21). Where application of a particular statutory provision to state entities would trench upon sovereign prerogatives or "upset the usual constitutional balance of federal and state powers," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and where the statute's text and history do not affirmatively evidence a congressional intent that States be covered, the term "person" may appropriately be construed to exclude the States. As the court of appeals correctly recognized, however, the FCA "does not intrude into any area of traditional state power." Pet. App. 21. The Act serves "to remedy and deter procurement of federal funds by means of fraud," and "[t]he States have no right or authority, traditional or otherwise, to engage in such conduct." *Ibid.* Petitioner chose to accept the benefits of a federal grant program, and it is neither anomalous nor surprising that petitioner—like other federal fund recipients—is subject to the substantive and remedial provisions designed to ensure that it is entitled to the money and that the funds are used for their intended purpose.⁶

reviewability here, certiorari should be granted in the instant case, in which the courts below squarely addressed both questions.

⁶ In construing the statutory term "person," it is important to bear in mind that *qui tam* actions prosecuted by private relators comprise only one category of FCA suits. The Act also authorizes the Attorney General to file an FCA action, 31 U.S.C. 3730(a), and it permits the government to intervene to take over the conduct of

The FCA's legislative history supports the conclusion that States are subject to the Act's liability provisions. The Senate Report accompanying the 1986 FCA amendments states that "[t]he False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations as well as States and political subdivisions." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986) (citations omitted). As the court of appeals explained, moreover, States have historically been regarded as appropriate relators in *qui tam* suits brought under the Act. See Pet. App. 22-23. Because the FCA authorizes *qui tam* suits to be brought by a "person," 37 U.S.C. 3730(b)(1), Congress's use of the same word to describe potential defendants suggests that any entity (including a State) that is authorized to file suit as a relator is also subject to liability under Section 3729. Pet. App. 23-24; *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (referring to the "normal rule of statutory construction that

a suit initially filed by a private relator, 31 U.S.C. 3730(c)(1). Where the government intervenes in a *qui tam* action to take over the conduct of the litigation, the suit is not meaningfully different, for Eleventh Amendment purposes, from a suit initially brought by the United States. Because suits brought or taken over by the government are not subject to any colorable Eleventh Amendment objection, the term "person" should not be given an artificially narrow construction simply because inclusion of States as potential defendants may create a difficult constitutional issue in *qui tam* actions prosecuted by private relators. Cf. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 11 (1989) ("For purposes of * * * lawsuits [brought by the United States against a State], States are naturally just like 'any nongovernmental entity'; there are no special rules dictating when they may be sued by the Federal Government, nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits.").

identical words used in different parts of the same act are intended to have the same meaning").

b. The Eleventh Amendment does not apply to suits by the federal government. See Pet. App. 15 (citing cases). Even where an FCA action is filed and prosecuted by a private relator, the suit is brought (at least in substantial part) on behalf of the United States, both because the suit is intended to redress fraud against the United States and because the government takes the lion's share of any recovery. See *id.* at 16. As the court of appeals explained, moreover, the government retains significant prerogatives in *qui tam* litigation even when it declines to intervene to take over the conduct of a suit. See *id.* at 17. "In light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits," the court of appeals correctly held that the instant suit "is not barred by the Eleventh Amendment." *Id.* at 18.

4. Currently pending before this Court are *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, No. 98-149 (argued Apr. 20, 1999); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, No. 98-531 (argued Apr. 20, 1999); *Kimel v. Florida Board of Regents*, cert. granted, No. 98-791 (Jan. 25, 1999); and *United States v. Florida Board of Regents*, cert. granted, No. 98-796 (Jan. 25, 1999). At issue in those cases is whether Congress validly authorized private damages actions against States for false advertising (No. 98-149), patent infringement (No. 98-531), and age discrimination in employment (Nos. 98-791 and 98-796). None of those cases arises under the FCA, and none involves application of the principle that suits by the

United States are outside the coverage of the Eleventh Amendment. The Court's decisions in those cases are therefore unlikely to resolve the existing circuit conflicts regarding the statutory and constitutional questions presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In The
Supreme Court of the United States

STATE OF VERMONT AGENCY
OF NATURAL RESOURCES,

Petitioner.

v.

UNITED STATES OF AMERICA EX REL.
JONATHAN STEVENS,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

**RESPONDENT RELATOR JONATHAN STEVENS'
BRIEF IN RESPONSE**

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STATEMENT OF ISSUES

1. Whether a State is a "person" subject to liability under 31 U.S.C. § 3729(a) of the False Claims Act.
2. Whether the Eleventh Amendment would allow Relator Jonathan Stevens to prosecute a False Claims Act suit against a non-consenting State to remedy an injury to the United States.

PARTIES TO THE PROCEEDINGS BELOW

The parties in the United States Court of Appeals for the Second Circuit were Relator Jonathan Stevens, Intervenor United States of America, and Defendant State of Vermont Agency of Natural Resources.

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STATEMENT OF THE CASE

This matter arises from an appeal of the United States District Court for the District of Vermont's Order denying Petitioner's Motion to Dismiss the Complaint. The Complaint states that the State of Vermont, through its subsidiary administrative agencies, knowingly submitted false claims for federal funding to the United States of America in violation of the False Claims Act, 31 U.S.C. §§ 3729 et seq.

The Vermont Agency of Natural Resources ("the Agency") was the recipient of federal funds at all times relevant hereto. The Agency, through its Department of Environmental Conservation ("DEC") and a subdivision called the Water Supply Division ("WSD"), received grant funds administered by the United States Environmental Protection Agency ("EPA"). The grant funds arose from the various federal environmental protection statutes, including the Clean Water Act, 33 U.S.C. §§ 1251 et seq., and the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq. The grants provided funds for the WSD's general financial needs for work allegedly performed in connection with the federally sponsored environmental programs.

As recipient of the federal grant funds, the Agency was subject to certain reporting requirements, including the submission of time and attendance records to reflect the actual time worked under the grants. Past expenditures served as the basis for maintaining or increasing assistance in future federal funding applications. The Agency did not follow such procedures, but instead it chose to manufacture its time records for the explicit purpose of ensuring a steady stream of federal funding.

A. PETITIONER MISREPRESENTS THE CLAIMS INITIATED BY RELATOR JONATHAN STEVENS.

Far more than a dispute about accounting practices, Petition at 3, the Complaint alleges that Petitioner fabricated time records for submission to EPA to retain, maintain, and even increase a stream of federal funding for state-administered environmental programs. Implicit in Petitioner's actions is the attempt to retain and/or obtain federal funds to which it was not entitled. See *United States ex rel. Stevens v. Vermont*, 162 F.3d 195, 202 (2d Cir. 1998), App. at 6-7 (setting forth the allegations in the Complaint).

In addition, this action is an appeal from the denial of a motion to dismiss. Petitioner has not answered the Complaint; nor has any discovery occurred. Accordingly, Petitioner's statement on page 3 of its Petition that the EPA "has no complaint with Vermont's administration of these grants" or any similar statement about the ultimate merits of the case is premature and reflects unsubstantiated factual assertions from outside the record. Respondent Jonathan Stevens is fully prepared to discuss the merits of the action, but a factual debate without an evidentiary record would be inappropriate given the procedural posture of this case.

Relator Jonathan Stevens was employed as an attorney with the WSD. To ensure that federal grant money is spent on federally-sponsored projects, the WSD is required to account for the actual time spent working on the grants. During the course of his employment, officials of the Agency and the WSD demanded that Mr. Stevens sign time records for submission to the EPA that the WSD

had fabricated to reflect that the grants were being spent. Employees of the DEC, like Mr. Stevens, did not work the hours arbitrarily assigned to them; nor did they record the time they actually worked under the federal grants to which their time was allocated.

The Agency knowingly and continuously submitted false claims to the federal government for salary and wage expenses based on the fictional time records. As a result of this practice, the time records reflected that the DEC had completely exhausted the federal grant money in connection with federal projects, thereby ensuring that: (1) the funds actually received could be retained by the Agency, and (2) the DEC could maintain or increase its grant funding in subsequent years. See App. at 5-7. Mr. Stevens and other DEC employees complained internally that they were required by management to submit false time records. Despite these complaints, DEC management continued its practice of requiring employees to sign false time records.

Petitioner submitted falsified time records to the federal government for the explicit purpose of retaining, maintaining, and potentially increasing an income stream of federal funds into the State of Vermont to which it was not entitled. Due to its administrative procedures, Petitioner does not know and cannot contend that the work reflected in its records, for which it obtained the federal funds, was ever undertaken. In short, this case is not merely about accounting practices; it is about a grant recipient's calculated efforts to manipulate time and expense records to maintain federal funding sources.

On May 26, 1995, Mr. Stevens filed suit, under seal, against the State of Vermont pursuant to the False Claims Act. See App. 94-95. The United States of America declined to intervene on June 27, 1996, and, on July 30, 1996, the District Court lifted the seal. The Complaint was served on the State of Vermont on November 7, 1996. Petitioner moved to dismiss the case, and the district court denied the motion on May 9, 1997. Petitioner's motion to reconsider was also denied. Petitioner subsequently filed its appeal of the district court's decision to the Second Circuit Court of Appeals. On December 7, 1998, the Second Circuit upheld the district court's decision. Petitioners filed a request for reconsideration and rehearing *en banc*, which was rejected. The present petition to this Honorable Court for a Writ of Certiorari followed the denial of reconsideration.

REASONS FOR THE PETITION

A. THE FEDERAL CIRCUIT COURTS ARE IN CONFLICT OVER BOTH QUESTIONS PRESENTED.

A conflict exists between the Federal Circuit Courts of Appeals over whether: (1) sovereign immunity bars this action, and/or (2) States are "persons" subject to False Claims Act liability. Presently, six Federal Circuit Courts of Appeal have decided one or both questions. States are subject to False Claims Act liability in the Second, Fourth, Eighth, and Ninth Circuits. The Second Circuit decided that Petitioner's constitutional and statutory construction defenses are without merit. See *United States ex rel. Stevens v. Vermont Agency of Natural Resources*,

162 F.3d 195 (2d Cir. 1998). The Eighth Circuit decided in separate cases that neither defense barred a relator's suit. See *United States ex. rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998) (holding that sovereign immunity does not apply to False Claims Act suits); *United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 154 F.3d 865 (8th Cir. 1998) (holding that States are "persons" subject to liability under the False Claims Act). The Fourth and Ninth Circuit Courts of Appeal have decided that the Eleventh Amendment does not prevent *qui tam* relators from bringing actions against States on behalf of the United States. See *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala.*, 104 F.3d 1453 (4th Cir. 1997); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957 (9th Cir. 1994), vacated on other grounds, 72 F.3d 740 (9th Cir. 1995).

In contrast, the D.C. Circuit and the Fifth Circuit courts have ruled, on separate grounds, that a realtor cannot sue the States under the False Claims Act. The Fifth Circuit concluded in *United States ex rel. Foulds v. Texas Tech Univ.*, No. 97-11182, 1999 WL 170139 (5th Cir. Mar. 29, 1999) that sovereign immunity barred suits initiated by private citizens pursuant to False Claims Act's *qui tam* provisions, and the D.C. Circuit ruled recently in *United States ex rel. Long v. SCS Business and Technical Inst., Inc.*, Nos. 98-5133, 98-5149, 98-5150, 1999 WL 179713 (D.C. Cir. April 2, 1999) that States are not "persons" subject to liability under the statute.

1. SOVEREIGN IMMUNITY

The Second Circuit rejected Petitioner's contention that the Eleventh Amendment bars actions to remedy injuries to the United States against States brought by *qui tam* relator, reasoning that:

The real party in interest in a *qui tam* suit is the United States. All of the acts that make a person liable under § 3729(a) focus on the use of fraud to secure payment from the government. It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share – at least 70% – of any recovery. To be sure, the *qui tam* plaintiff has an interest in the outcome, but his interest is less like that of a private party than that of an attorney working for a contingent fee. *Qui tam* claims simply do not seek the vindication of a right belonging to a private plaintiff, and if there has been no injury to the United States, the *qui tam* plaintiff cannot recover.

In sum, although *qui tam* actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest in any such action.

Further, . . . , the government has the right to control the action. If it wishes to intervene in the action at the outset, the *qui tam* plaintiff cannot prevent it from doing so. Whether or not the government intervenes, it has the right to be kept abreast of discovery in the *qui tam* suit and

the right to prevent that discovery from interfering with its investigation or pursuit of criminal or civil suit arising out the same facts. If the government intervenes, it takes control of the lawsuit; it may have the participation of the *qui tam* plaintiff limited; and it is not bound by any act of the *qui tam* plaintiff. The government has both the right to prevent a dismissal sought by the *qui tam* plaintiff and the right to cause the action to be dismissed for any rational governmental reason, notwithstanding the *qui tam* plaintiff's desire that it continue.

In light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits, we conclude that such a suit is in essence a suit by the United States and hence is not barred by the Eleventh Amendment.

App. at 16-17 (inner citations and inner quotations omitted).

In view of the basic design of the False Claims Act as a remedy for fraud committed on the United States of America (and thereby the citizens of the fifty states), the Second Circuit concluded that sovereign immunity does not apply to the suit based on a fundamental principle of constitutional law:

As against the United States, . . . , States have no sovereign immunity. When the States, in framing and adopting the Constitution, agreed to create a federal government established for the equal benefit of the people of all the States, they necessarily recognized that the

privilege of immunity would be inconsistent with the government's paramount sovereignty. A permanent waiver of the State's immunity from suit by the United States is inherent in the constitutional plan. In sum, nothing in the Eleventh Amendment or in any other provision of the Constitution prevents a State's being sued by the United States.

App. at 15 (inner citations and inner quotations omitted).

The Second Circuit's holding is consistent with the views of the majority of federal circuits that have confronted the defense. The majority opinion in those courts is that the Eleventh Amendment defense is a "red herring" because the United States is the real party in interest in a False Claims Act suit. See *Rodgers*, 154 F.3d at 868; *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1458-59 (4th Cir.), cert. denied, 118 S.Ct. 301 (1997); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 962-63 (9th Cir. 1994), vacated on other grounds, 72 F.3d 740 (9th Cir. 1995) (en banc); see also *United States ex rel. Milam v. Univ. of Texas*, 961 F.2d 46, 50 (4th Cir. 1992).

Despite the consistency of the other Courts of Appeal on the issue of sovereign immunity, the Fifth Circuit recently reached the contrary conclusion. See *United States ex rel. Foulds v. Texas Tech Univ.*, No. 97-11182, 1999 WL 170139, at *7-10 (5th Cir., Mar. 29, 1999). Downplaying the source of the injury and the related position of the United States as the real party in interest, the Fifth Circuit decided that the Eleventh Amendment prevents any and all suits "commenced or prosecuted" by private citizens against a State. *Id.* In essence, the Fifth Circuit concluded

that the Legislature and the Executive are constitutionally restrained by the Eleventh Amendment from enlisting private citizens to pursue claims of fraud committed on the United States. *Id.* Based on the Eleventh Amendment and dicta found in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) to the effect that Congress cannot delegate its authority to sue a state to a private person, the Fifth Circuit held that only federal officers can initiate suits against States. Thus, the Fifth Circuit concluded "that when the United States has not actively intervened in the action, the Eleventh Amendment bars *qui tam* plaintiffs from instituting suits against the sovereign states in federal court." *United States ex rel. Fould*, 1999 WL 170139 at *10. Consistent with the views of the Fifth Circuit, the D.C. Circuit has also stated that it has reservations whether the Eleventh Amendment prevents suits by private relators. See *United States ex rel. Long*, 1999 WL 178713, at *12-13.

In sum, Respondent Jonathan Stevens agrees that a conflict exists amongst the Circuit Courts of Appeal on whether the Eleventh Amendment applies to suits against States instituted by private relators on behalf of the United States under the False Claims Act.

2. STATES AS "PERSONS" SUBJECT TO FALSE CLAIMS ACT LIABILITY.

The Second Circuit concluded that States are proper defendants under the False Claims Act in *United States ex rel. Stevens*. App. at 19-30. In particular, the Second Circuit held that under traditional rules of statutory construction, States are "persons" subject to liability under

the Act. *Id.* In so holding, the Second Circuit declined Petitioner's urging to apply the "plain statement" rule set forth in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989). App. at 19-20.

The Second Circuit instead concluded that: "States have no right of authority, traditional or otherwise, to engage" in fraud. Thus, there was nothing inherent in acts of fraud committed by a State which, if regulated by a federal statute, would "upset the usual constitutional balance of federal and state powers" such that a literal identification of States as "persons" is required in the statute before they could be considered as False Claims Act defendants. Instead, the Court applied the long accepted rule of statutory construction set forth in *United States v. Cooper*, 312 U.S. 600, 604-05 (1941), that:

although "in common usage[] the term 'person' does not include the sovereign, . . . there is no hard and fast rule of exclusion." *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941). "Whether the term 'person' when used in a federal statute includes States cannot be abstractly declared, but depends upon its legislative environment." *Sims v. United States*, 359 U.S. at 112; see *Georgia v. Evans*, 316 U.S. 159, 161 (1942). "The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring [a] state . . . within the scope of the law." *United States v. Cooper Corp.*, 312 U.S. at 605.

App. at 21.

Based on the principle of statutory construction set forth in *Cooper*, the Second Circuit recognized that: (1) the legislative history, including the Senate Report, indicates that States are "persons" under the False Claims Act; (2) the States' status as potential False Claims Act relators under the liability provisions meant that they were also potential defendants; (3) the civil investigative demand provisions specifically include States in its definition of "persons" subject to investigation for False Claims Act violations; and (4) the legislative history for the original act specifically indicated that the Legislature was concerned about fraud committed by State officials when the statute was originally adopted in 1863. App. at 20-30. Such evidence, viewed in context of the statute's broad remedial purpose to reach all types of fraud committed on the federal government, led the court to conclude that States are subject to False Claims Act liability. App. at 21-30. Accordingly, the Second Circuit held:

. . . the term "[a]ny person" in § 3729(a) is sufficiently broad to encompass the States; that Congress meant to include the States within the term "person" in § 3730(b)(1), allowing them to bring suits under that section as *qui tam* plaintiffs; that there is no indication in the language or in the legislative history that Congress ascribed different meanings to the term "person" as used in §§ 3720(a), 3730(a), and 3730(b)(1); and that Congress intended the false-claims statutes to permit suits under §§ 3730(a) and 3730(b)(1) against any entity that presented false monetary claims to the government. We thus conclude that the present suit is authorized by the FCA.

App. at 30.

Indeed, the Second Circuit's holding *confirms* the previous decision by a sister circuit in *United States ex rel. Zissler*, in which the Court of Appeals for the Eighth Circuit held that "a False Claims Act action against a State falls within 'the usual constitutional balance between the States and the Federal Government.'" 154 F.3d at 874 (quoting *Will*, 491 U.S. at 65).

The Eighth Circuit also rejected the State defendant's arguments based upon State/Federal balance, concluding that:

As the real party in interest, the federal government's power to sue a State is well within the usual constitutional balance of federal and state powers. The consent of the States to suit by the United States is 'inherent in the [plan of the constitutional] convention,' *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991), and 'nothing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever seriously supposed to prevent a State's being sued by the United States.' *United States v. Mississippi*, 380 U.S. 44 (1936).

* * *

Therefore, Congress's intent to include States as liable parties need not be manifest in 'unmistakably clear' language.

Id. at 873-74.

In contrast to the holdings of the Second and Eighth Circuits, the D.C. Circuit recently concluded that States are not persons subject to False Claims Act liability. See *United States ex rel. Long*, 1999 WL 178713, at *3-17. In so holding, the D.C. Circuit concluded that *Will's* "plain

statement" rule required that Congress make its intent unmistakably clear if it intended the False Claim Act is to apply to States. The court also rejected the conclusion that the False Claims Act, if applied to States, does not interfere with essential State functions or alter the usual constitutional balance of Federal and State power. According to the D.C. Circuit, the False Claims Act as currently written or as originally adopted does not precisely define the word "person;" thus, there was no clear statement of State liability under the statutes sufficient to satisfy *Will*. *Id.* Finding that no clear statement of congressional intent existed in the statute, the D.C. Circuit held that States are not subject to False Claims Act liability. *Id.* 15-17.

In sum, Respondent agrees with Petitioner that a clear conflict exists between the Circuit Courts of Appeal on the issue of whether States are "persons" subject to False Claims Act liability. There is no way to reconcile the decisions rendered in the Second, Eighth, and D.C. Circuits concerning whether a State can be sued under the statute.

B. THIS CASE RAISES NO QUESTIONS "GOING TO THE HEART OF FEDERAL-STATE RELATIONS".

Notwithstanding Petitioner's contentions about disruption of the "state/federal balance of power," the true controversy presented by this appeal is whether the federal government (and thus the people of the fifty states) will retain a remedy against individual States, State university systems, State administrative agencies, and State research organizations for fraud committed on the public

fisc. As noted by both the Second and Eighth Circuit Courts of Appeal, there is no inherent constitutional right, role, or core function served by a State that constitutionally and categorically permits it to defraud the citizens of the United States. As stated by the Eighth Circuit Court of Appeals:

Nor does application of the False Claims Act to State constitute coercion, thereby disrupting the usual balance of power between the United States and the States. There is no coercion in subjecting the States to the same conditions for federal funding as other grantees: States may avoid these requirements simply by declining to apply for and to accept these funds. But if they take the King's shilling, they take cum onere. . . . Here, the only cooperation asked of a State is honesty, Accordingly, we reject the [State defendant's] suggestion that the False Claims Act's remedies impermissibly commandeer the legislative processes of the States. Furthermore, the [State defendant] should not have needed explicit notice of the basic understanding that the grants were to be obtained and administered without fraud.

United States ex rel. Zissler, 154 F.3d at 873 (inner citations and inner quotations omitted).

In sum, while Respondent agrees with Petitioner that conflict exists in the Circuit Courts of Appeal concerning the issues stated in this appeal, Respondent strongly disagrees that subjecting a State to False Claims Act liability for fraud somehow disrupts the traditional, constitutional

balance of power between States and the Federal government.

CONCLUSION

Respondent Jonathan Stevens agrees that a conflict exists between the Federal Circuit Courts of Appeal regarding both the issue of sovereign immunity and the statutory construction arguments raised by Petitioner. In that respect, Respondent agrees that this case warrants a decision by this Honorable Court. Respondent respectfully disagrees that this case involved substantial issues related to the balance of State and Federal constitutional powers.

Dated: May 26, 1999

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1998

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICAN *EX REL.*
JONATHAN STEVENS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, ALABAMA, ALASKA,
ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA,
IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MISSOURI,
MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA,
NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH
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No. 98-1828

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL.
JONATHAN STEVENS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, ALABAMA,
ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO,
CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII,
IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA,
MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEBRASKA,
NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, NORTH
DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA,
SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON,
WEST VIRGINIA and WYOMING IN SUPPORT OF PETITIONER

STATEMENT OF AMICI INTEREST

The States of New York, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia and Wyoming urge this Court to grant certiorari in this case involving two important questions affecting the liability of States under the federal False Claims Act ("FCA"). At issue in this case is, first, whether a State is a "person" who may be sued by private citizens or by the United States under the FCA and, second, whether a private person may sue a State under the FCA in order to reap a financial reward for himself and to recover money for the United States despite the bar of the Eleventh Amendment to the U.S. Constitution.

Both issues have been the subject of recent conflicting determinations by the United States Courts of Appeals. Compare *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 1999 WL 178713 (D.C. Cir. April 2, 1999), *opn. supplemented*, 1999 WL 252644 (D.C. Cir. April 30, 1999) (State is not a "person" under the FCA); *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (5th Cir. 1999) (Eleventh Amendment bars suits by private citizens against States), with *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195, 203 (2d Cir. 1998), *pet. for cert. pend'g*, No. 98-1828 (May 11, 1999) (State is a "person" under the FCA and Eleventh Amendment is not a bar); *U.S. ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 865, 874 (8th Cir. 1998) (State is a "person" under the FCA); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998) (Eleventh Amendment

is not a bar to FCA lawsuit), *pet. for cert. pend'g*, No. 98-1664 (April 14, 1999).

This case affords the Court the opportunity to review both issues. *Amici* States accordingly urge this Court to grant Vermont's petition and thereby to resolve both matters affecting the States' liability under the FCA.

The decision below undermines the *amici* States' interests and upsets the federalist balance in two important ways. First, its holding that States are "persons" subject to suit under the FCA exposes the States to very significant financial liability. States receive substantial federal dollars under a vast array of federal social welfare, education, environmental, transportation and other programs where they perform regulatory and police power functions. Federal grants to State and local governments doubled from \$115 billion in 1988 to \$230 billion in 1997. See Bureau of the Census, U.S. Department of Commerce, Publication FES/97, Federal Expenditures by State for Fiscal Year 1997 at 46, Table 11 (April 1998). Under these federal grant programs, States agree to comply with certain federal requirements, including the responsibility to repay federal dollars that are overpaid to the State in error.

The FCA exposes States to penalties that can amount to hundreds of millions of dollars. Pursuant to most federal aid programs, States file thousands of claims and numerous reports each year with federal agencies. Because a single policy or reporting practice that is found to be wrongful could taint each and every claim filed, and because there is a six-year statute of limitations under the FCA, there is a potential for enormous damages in FCA lawsuits against States. For example, in *Foulds*, the plaintiff alleged that staff physicians at Texas Tech Health Sciences Center routinely signed patient charts and Medicare/Medicaid billing forms certifying that they personally performed or supervised the performance of treatment for

patients when in fact the patients were allegedly seen only by residents. The *qui tam* relator alleged that based upon this wrongful practice, the State defendant submitted over 400,000 false claims and received over \$20 million in overpayments. 171 F.3d at 282 & n. 2. Because each false claim could result in a penalty of up to \$10,000, the State's liability in that case could amount to hundreds of millions, or even billions, of dollars. These potentially large financial judgments against States could have disastrous effects on a State's treasury.¹

Second, the opinion below would allow private citizens to sue States on their own behalf and on behalf of the United States. In the vast majority of cases, the United States remains on the sidelines and allows the *qui tam* relator to commence and prosecute the FCA lawsuit on his or her own. Because the private party is seeking only to reap a financial reward, the *qui tam* relator is usually prepared to pursue the litigation to final judgment or settlement without any concern for the disruption that burdensome discovery and a trial will have on the States' administration of these complex federal programs. More importantly, because the relator's only interest is financial, States lose a meaningful opportunity to resolve the underlying lawsuit through negotiation or through the political process, even if such a resolution would be in the public interest.

As this Court recognized in *Hughes Aircraft Company v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997), "[a]s

¹ A finding that the FCA cannot be applied to the States does not leave the United States without viable remedies. Most federal programs contain provisions requiring States to repay monies improperly received. See, e.g., 7 U.S.C. § 2020(g)(Food Stamps); 42 U.S.C. § 604 (Aid to Families With Dependent Children); § 1396(c)(Medicaid). If existing administrative remedies are inadequate to ensure the recovery of money erroneously or wrongfully obtained by the States, those mechanisms should be improved. The States should not be subjected to the punitive sanctions of the FCA through a rewriting of that statute.

a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." Because relators sue only for their own pecuniary gain, they do not share the federal government's broader interest in the public welfare. Consequently, FCA *qui tam* litigation causes State officials to devote time and resources to defending their actions in discovery and at trial. Even if it would be appropriate to attempt to resolve the dispute through negotiation or the political processes, States are impeded in their ability to do so where the lawsuit is being prosecuted by a private citizen with his own personal financial interest at stake.

In his dissenting opinion in the Second Circuit, Judge Weinstein eloquently expressed the enormous burden that a suit by a *qui tam* relator places on the States' ability to implement these major federal programs in partnership with the United States. He explained that "[a]pplication of the FCA's *qui tam* provisions to the States interferes with the political process in ways which seriously undermine the position of the States vis-a-vis the federal government." *Stevens*, 162 F.3d at 219 (Weinstein, J. dissenting).

Counsel for the relator in *Long*, for example, sought and obtained the production of voluminous documents, including documents that pertain to the internal decisionmaking processes of the New York State Education Department. He also noticed numerous depositions of current or former State employees in his ongoing effort to probe the internal processes of State government. Because FCA litigation is very disruptive, and a resolution through negotiation becomes extremely difficult given the relator's narrow focus, FCA *qui tam* lawsuits interfere with the efficient administration of important state administered regulatory programs.

SUMMARY OF ARGUMENT

The Courts of Appeals are squarely divided over the two issues raised in Vermont's petition. A resolution of the "person" issue will resolve the express and deep-seated conflict between the Second Circuit's decision below (which is in accord with the Eighth Circuit's decision in *Rodgers*) and the recent decision by the District of Columbia Circuit in *Long*. A determination of the Eleventh Amendment issue will resolve the express conflict between the Second Circuit's decision (which is in accord with the Eighth Circuit's decision in *Zissler* as well as earlier decisions by the Fourth and Ninth Circuits) and the recent decision by the Fifth Circuit in *Foulds*.

The conflicts among the Courts of Appeals reflect a basic disagreement over fundamental principles that underlie federalism. The core principles at issue on the "person" question involve the "ordinary rule of statutory construction" that a State is not usually considered a "person" where liability is imposed, and the "plain statement" rule which requires a clear statement of State inclusion whenever Congress enacts legislation that could alter the federal balance of power. A central principle at issue on the Eleventh Amendment question is that States have an Eleventh Amendment immunity to suit from private citizens, even when the private party is designated to sue on behalf of the United States as well as on his or her own behalf.

The *amici* States note that the United States acquiesces in grant of this petition. Because this case presents for review both related FCA issues upon which the Courts of Appeals are divided, it is an appropriate vehicle by which this Court may resolve the underlying issues involving important matters of federalism that affect the States' relations with the federal government. A resolution by this Court is essential.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW OF VERMONT'S PETITION IN ORDER TO RESOLVE THE CONFLICT IN THE CIRCUITS AND DECIDE THE IMPORTANT ISSUES OF FEDERALISM PRESENTED BY THE PETITION.

The conflicts among the Courts of Appeals with respect to the application of the FCA to the States reveal two dramatically competing views of the FCA. In the States' view, the decision of the Second Circuit majority, which essentially adopted the position of the United States and the relator, undermines federalism and seriously distorts this Court's rulings. If left undisturbed, the Second Circuit's decision would expose States to FCA liability that was never envisioned by the Congress that enacted the FCA in 1863.

A. The Person Issue

Under this Court's precedents, two principles that underlie federalism must be used in determining that States are not "persons" under the FCA: the "ordinary rule of statutory construction" that the word "person" in a statute does not include "State," and the "plain statement" rule.

1. The "Ordinary Rule of Statutory Construction"

First, this Court has held that, under the "ordinary rule of statutory construction," where "person" is included in a statute that imposes a new liability, that word does not include State. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1978). This rule of statutory construction should apply to the FCA which covers the conduct of "any person" and provides

liability for treble damages and penalties to which the States had previously not been subjected.

The United States and the relator contend that this rule of statutory construction does not apply where the statute is for the benefit of the United States and where its purpose, prevention of fraud, is clear. That argument finds no support in case law.

They further contend that because the statute also uses the word "person" to define the relator in 31 U.S.C. § 3730(b), and because some States have been *qui tam* relators, the applicable principle of statutory construction is that the same word used in different sections of the same statute should have the same meaning. As the D.C. Circuit explained in *Long*, this principle does not apply to the FCA because, inter alia, "[i]mposing liability is quite different from conferring a right to sue," and the canon has an important exception where the subject matter to which the word refers is not the same. *Long*, 1999 WL 178713 at * 17, n. 15.

2. The "Plain Statement" Rule

Second, this Court has held that the "plain statement" rule requires Congress to provide a "clear" or "plain" statement whenever it enacts a law that: (a) alters the federal balance of power; (b) preempts the historic powers of the States; (c) abrogates the States' sovereign immunity; or (d) imposes a new condition upon the receipt of federal funding. See, *Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 196, 206 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *Will*, 491 U.S. at 64; *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *United States v. Bass*, 404 U.S. 336 (1971). This rule squarely applies to the FCA.

In *Bass*, Justice Marshall explained:

[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

404 U.S. at 349.

There is no dispute that the FCA does not contain a "plain statement" that States are included within the scope of the liability provision. The respondents argue that the "plain statement" rule has no application to the FCA because the States have no sovereign immunity with respect to the federal government. They further contend that States have no historic right to defraud the United States and, therefore, the United States is not imposing a financial burden on the States when it obtains additional monetary penalties under this statute. These arguments have been successful not only in the Second Circuit but also in the Eighth Circuit's decision in *Zissler*.

This analysis of the effect of the FCA on States misconstrues the function of the "plain statement" rule, which is to protect the States' position in our federalist scheme against unconsidered federal encroachment that usurps the States' authority, and mistakes the intrusiveness of FCA *qui tam* lawsuits on the States' performance of essential functions. Judge Silberman, the author of the *Long* opinion, properly noted that "the Act's imposition of liability necessarily interferes with a State's sovereign performance of a range of indisputably essential functions, such as the administration of a State education department involved in the present case. . . . That the federal government funds in part that function does not destroy its essentiality to the State." *Long*, 1999 WL 178713 at * 15 (fn. omitted).

3. The Legislative History of the False Claims Act

The legislative history of the FCA demonstrates that the Act was never meant to apply to the States either when it was originally enacted in 1863 or when it was later amended.

The FCA was enacted in 1863 to combat rampant fraud by large private war material contractors in Civil War defense contracts. *See United States v. Bornstein*, 423 U.S. 303, 309 (1976); *United States v. Hess*, 317 U.S. 537, 547 & n. 12 (1943). Because the Union of States had been billed for nonexistent or worthless military goods, Congress sought to stop this plundering of the Union's treasury. *See, e.g.*, 62 Cong. Globe, 952-958, 37th Cong., 3d Sess. (1863).

As originally enacted in 1863, the FCA prohibited "any person not in the military" from submitting a false claim or a false record in order to have a claim paid to the United States, or causing such claim or record to be presented and paid. Where liability was found, the statute provided for both civil penalties (double damages plus a fine of two thousand dollars and costs) and criminal penalties (possible imprisonment). *See* Act of March 2, 1863, §§ 1, 3, 37th Cong. Chap. 67, 12 Stat. 696, 698.

There was no mention of States in the original legislative history. The legislative debates from the 1863 law discussed individual private war contractors who had defrauded the Union, not States. *See, e.g.*, 62 Cong. Globe 955 (1863) ("The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such. . .") (remarks of Sen. Howard); *id.* at 958 ("if a man swindles the government in times like this there ought never to be any limitation. . .") (remarks of Sen. Grimes).

The only reference to State officials (but not States themselves) is contained in a report by a House investigating committee

from 1862 which, in the course of reporting on the grossest frauds upon the government in the provision of war contracts, made reference to fraud by a quartermaster in Indiana. *See* H.R. Rep. No. 2, 37th Cong., 2d Sess. xxxviii-xxxix (1862). When the FCA was debated in Congress the following year, the sole reference to the 1862 report was made by Senator Wilson of Massachusetts in the context of arguing in favor of language of the bill that would make war contractors liable as if they were "in the military or naval forces of the United States." 62 Cong. Globe at 956. Senator Wilson did not discuss the portion of the 1862 report referring to State officials.

For 123 years, from 1863 until 1986, the statute was "largely unchanged." H.R. Rep. No. 99-660, 99th Cong. 2d Sess. (1986) at 17. *See also* Act of Sept. 13, 1982, Pub. L. 97-258, 96 Stat. 877 (reorganizing the statute without making any substantive changes -- the language of the liability provision was rewritten to apply to "[a] person not a member of an armed force of the United States").

In 1986, the statute was substantially amended. The amendments defined knowledge of a false claim to include reckless conduct and deliberate ignorance of the circumstances. The amendments also increased the punitive nature of the statute by providing for treble damages and a civil penalty of between \$5,000 and \$10,000 that could be imposed for each false claim or false report filed. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 § 2 (1986), amending 31 U.S.C. § 3729 (the liability section of the Act).

However, Congress in 1986 made no substantive change to the scope of section 3729, which defined the group subject to the liability provisions of the Act. In fact, the provision returned to its (pre-1982) format of applying to "[a]ny person" although the exception for members of the armed forces was revised and moved to a new section, 31 U.S.C. § 3730(e)(1).

The legislative history of the 1986 amendments shows that Congress wanted to provide stronger measures to combat fraud by private enterprise against the United States. There is no evidence in the legislative history that fraud committed by States was under consideration or that Congress discussed and debated the financial impact upon States of increasing the Act's penalties and providing for treble damages. In fact, the Congressional Budget Office advised that the 1986 amendments were "expected to involve no significant costs to the federal government or to State or local governments." S. Rep. No. 99-345, 99th Cong. 2d Sess. (1986) at 37, *reprinted in* 1986 U.S. Code Cong. & Adm. News ("U.S.C.C.A.N.") 5266, 5302.²

B. The Eleventh Amendment Issue

This Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996), stands for the proposition that the Eleventh Amendment prevents private parties from suing States in federal court under a statute, like the FCA, which was enacted in 1863 under Congress' Article I power. Because *qui tam* relators have a separate, legal interest in the FCA lawsuit, they are private persons suing States for money damages and their FCA suits against States are barred by the Eleventh Amendment.

The United States and the relator assert that the Eleventh Amendment does not apply to the FCA because the only "real party in interest" is the United States and the States have no

² The only reference to States as liable parties came in a discussion in the background and history section of the Act in the Senate Report, where the committee assumed that States were already covered by the statute. S. Rep. No. 99-345 at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273. The D.C. Circuit properly concluded in *Long* that this assumption of the Senate Report was wrong and "of no legal significance." *Long*, 1999 WL 178713 at * 6. *Accord United States ex rel. Graber v. City of New York*, 8 F.Supp.2d 343, 354-55 (S.D.N.Y. 1998), *overruled by Stevens*, 162 F.3d 195.

Eleventh Amendment immunity against the federal government. The Second Circuit's opinion, which supports respondents' position, also represents the view of a majority of the Circuits which have addressed the issue. *See Zissler*, 154 F.3d at 872 ("[T]he United States is the real party in interest because of its significant control over the course of the litigation and its dominant share of the proceeds thereof"); *see also United States ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453 (4th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 301 (1997); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994).

However, these decisions ignore the fact that the relator has a separate, legal interest in the FCA lawsuit and is solely responsible for prosecuting the action where the United States does not intervene. The original statute authorized the "person" bringing the suit and "prosecuting it to final judgment" to recover one-half of the damages recovered. *See Act of March 2, 1863, supra*, § 6. The statute now provides that "[a] person may bring a civil action for a violation of section 3729 *for the person and for the United States Government.*" 31 U.S.C. § 3730(b)(emphasis added).

In the event the United States does not proceed with the lawsuit, which occurred in the instant action, the relator is the only party who prosecutes the action through final judgment. *See id.* § 3730(b)(1), (b)(4)(B), (c)(3). According to the FCA, in these circumstances the person bringing "the action *shall* have the *right* to conduct the action." *Id.* § 3730(b)(4)(B), 3730(c)(3)(emphasis added). Although the United States can seek to intervene at a later stage of the proceedings, the federal government must show "good cause" to do so. *Id.* § 3730(c)(3). In addition, intervention by the United States at a later stage of

the proceedings is "without limiting the status and rights of the person initiating the action." *Id.* § 3730(c)(3).

Where the relator prosecutes the action to a judgment or settlement, the relator's share of the damages and penalties "shall be not less than 25 percent and not more than 30 percent of the proceeds." *Id.* § 3730(d)(2). Where the United States proceeds with the action, the relator is still entitled to receive between 15 and 25 percent of the proceeds. *See id.* § 3730(d)(1). The relator is also entitled to receive attorney's fees, costs and expenses from the person found liable. *See id.* § 3730(d)(1), (2).

Thus, the interests of the relator and the United States are separate. *See Hughes Aircraft*, 520 U.S. at 949 n. 5 ("[A] relator's interests and the Government's do not necessarily coincide. Moreover, as the statute specifies, *qui tam* actions are brought both 'for the person and for the United States Government.' 31 U.S.C. § 3730(b)(1).") (emphasis in original).

Even if the *qui tam* relator were acting entirely at the behest of the United States, the United States is not authorized to designate private citizens to sue States. Such a designation runs afoul of the "plan of the convention," under which States gave up their claim of sovereign immunity, but only to the federal government. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991) ("We doubt, to begin with, that that sovereign exemption *can* be delegated -- even if one limits the permissibility of delegation (as respondents propose) to persons on whose behalf the United States itself might sue. The consent, 'inherent in the convention,' to suit by the United States -- at the instances and under the control of responsible federal officers -- is not consent to suit by anyone whom the United States might select.") (emphasis in original).

The Fifth Circuit's decision in *Foulds*, the Eleventh Amendment discussion by the D.C. Circuit in *Long*, and the dissenting

opinions by Judge Weinstein in the Second Circuit in *Stevens* and by Judge Panner in the Eighth Circuit in *Rodgers*, are directly supportive of the States' position that the *qui tam* relator's FCA lawsuit is barred by the Eleventh Amendment. Because of the importance of the Eleventh Amendment issue to the States, this Court should review that issue, resolve the conflict between the Circuits and eventually conclude that the Eleventh Amendment constitutes a bar to the *qui tam* relator's lawsuit.

C. The Issues Are Of Fundamental Importance To The States

Finally, the *amici* States submit that review of both issues presented in this petition is important because the matters which divide the parties and the Circuits are fundamental to state-federal relations. The *amici* States therefore urge this Court to review the decision below to resolve the tension that exists between the position of the federal government and the relator and the position of Vermont over whether the Act can be applied to States.

CONCLUSION

**For the Reasons Discussed Herein and in the Petition, The
State of Vermont's Petition for a Writ of Certiorari Should
Be Granted.**

Dated: Albany, New York
June 10, 1999

Respectfully submitted,

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No. 98-1828

Supreme Court U.S.
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CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999**

**STATE OF VERMONT AGENCY OF NATURAL
RESOURCES,**

Petitioner,

- against -

**UNITED STATES OF AMERICA *EX REL.* JONATHAN
STEVENS,**

Respondent.

**On Petition For a Writ of Certiorari to the United
States Court of Appeals For the Second Circuit**

**BRIEF OF AMICI CURIAE THE CITY OF NEW
YORK, THE CITY OF LOS ANGELES, THE CITY
AND COUNTY OF SAN FRANCISCO, AND THE
NATIONAL LEAGUE OF CITIES IN SUPPORT OF
PETITIONER**

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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999**

**STATE OF VERMONT AGENCY OF NATURAL
RESOURCES,**

Petitioner,

- against -

**UNITED STATES OF AMERICA *EX REL.* JONATHAN
STEVENS,**

Respondent.

**On Petition For a Writ of Certiorari to the United
States Court of Appeals For the Second Circuit**

**BRIEF OF AMICI CURIAE THE CITY OF NEW
YORK, THE CITY OF LOS ANGELES, THE CITY
AND COUNTY OF SAN FRANCISCO, AND THE
NATIONAL LEAGUE OF CITIES IN SUPPORT OF
PETITIONER**

INTEREST OF AMICI

The City of New York, the City of Los Angeles, the City and County of San Francisco, and the National League of Cities (collectively referred to as "amici") respectfully submit this brief as amici curiae supporting the petition for certiorari of the State of Vermont. Amici urge this Court to grant Vermont's petition because the Second Circuit's decision in this case, which conflicts with other circuits in allowing states to be sued under the federal False Claims Act ("FCA"), involves a critically important issue both for

states and local governments. Allowing this decision to stand without review will subject states and local government to the FCA's crushing remedies of treble damages plus penalties and will undermine the system of cooperative federalism upon which this nation was founded.

The City of New York is a municipality that annually receives in excess of \$3 billion in federal funds either directly from the United States or through the State of New York for numerous essential municipal services and programs. Generally, the City of New York is responsible for providing these essential services to its citizens and for implementing these programs, while the federal government and State of New York disburse the funds and monitor their expenditure.

The City of Los Angeles is a municipality that annually receives several hundred million dollars in federal funds either directly from the United States or through the State of California for numerous essential municipal services and programs. Generally, the City of Los Angeles is responsible for providing these essential services to its citizens and for implementing these programs, while the federal government and the State of California disburse the funds and monitor their expenditure.

The City and County of San Francisco is a municipal corporation that annually receives in excess of \$400 million in federal funds either directly from the United States or through the State of California, for numerous essential municipal services and programs. Generally, the City and County of San Francisco is responsible for providing these essential services to its citizens and for implementing these

programs, while the federal government and the State of California disburse the funds and monitor their expenditure.

The mission of the National League of Cities ("NLC") is to strengthen and promote cities as centers of opportunity, leadership and governance. NLC was established in 1924 by and for reform-minded state municipal leagues. NLC is comprised of 49 state municipal leagues, more than 1,500 member cities and 135,000 elected officials. Through the membership of the state municipal leagues, NLC represents more than 18,000 cities and towns of all sizes in total.

The False Claims Act was enacted in 1863 at the height of the Civil War primarily to "combat rampant fraud in Civil War defense contracts." S. Rep. No. 99-345, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5266, 5273. The chief purpose of the Act when enacted was to address fraud perpetrated by large private contractors. *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Over the years, Congress amended the FCA many times, making the most significant amendments in 1986 by, *inter alia*, increasing the statute's mandatory civil remedies from double to treble damages and from a \$2,000 penalty to a \$5,000-\$10,000 penalty for each violation. 31 U.S.C. § 3729(a). See S. Rep. No. 99-345, 99th Cong., 2d Sess. 8, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. Under the statute, as amended in 1986, a whistleblower, known as the "relator," is generally entitled to receive between 15 and 30 percent of the total recovery. 31 U.S.C. §§ 3730 (d)(1); (d)(2).

Prior to the 1986 amendments, it appears that, with one exception, the statute was not invoked against states or

localities. See *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980) (court vacated district court decision that states were not "persons," holding instead that the district court had lacked subject matter jurisdiction over the case). Subsequent to 1986, however, there have been an increasing number of cases brought against governmental entities, thereby subjecting states and localities to the statute's severe remedial structure and allowing private individuals to collect a bounty at state and local taxpayers' expense.

The Second Circuit's holding that states are "persons" under the FCA has profound implications for the issue of local government liability. For local governments, the critical question for determining if they are "persons" under the statute is whether the statute is punitive; if so, liability may be imposed on them only if there is unequivocal congressional intent to do so. The rationale for this common law immunity is that punitive sanctions punish innocent taxpayers, not actual wrongdoers, and subject those governments to undue fiscal constraints. In the FCA context, states have also argued that punitive remedies should not be imposed against them, and, therefore, several circuits have examined the issue of whether the statute's remedial scheme was punitive. In this case, the Second Circuit held that the remedies in the FCA were not punitive, while the D.C. Circuit suggested otherwise.

As a result of the Second Circuit's holding, funding for local government services may decrease significantly. Both state and local government liability under the FCA will adversely affect localities' ability to serve their residents. Since localities receive state funding for services they provide, to the extent FCA liability depletes state

funds, state aid to those localities is likely to decrease concomitantly. Local governments and states are interdependent entities, with states providing funding and expecting local governments to provide direct services. It is local governments that actually administer many federal programs, providing services such as education, health, child welfare, and environmental protection, and it is the localities' ability to provide these critical services that is jeopardized by the treble damages and \$10,000 per claim penalty imposed by the FCA against both states and localities.

Amici therefore are vitally interested in the outcome of this suit. They submit that, in seeking to combat private military profiteering during the Civil War by enacting the FCA, and in subsequently amending the statute to augment punitive remedies, Congress never intended to disrupt the administration of federal programs at the state and local level. But that is exactly the result of permitting FCA liability, since it allows recoveries of treble damages, penalties, and a windfall to an individual whistleblower, all at the expense of state and local taxpayers. Amici urge the Court to grant Vermont's petition and reverse the Second Circuit's determination that states are "persons" under the FCA.¹

¹ Amici do not address the issue of whether the Eleventh Amendment bars suits by relators against states when the United States does not intervene in a suit. However, since state funding for programs administered on the ground level by municipalities or other local governmental entities is threatened by the Second Circuit's holding that the Eleventh Amendment is inapplicable, amici join in Vermont's discussion of the Eleventh Amendment.

REASONS FOR GRANTING THE PETITION

I

RESOLUTION OF THE CIRCUITS' CONFLICT OVER WHETHER THE FCA IMPOSES PUNITIVE REMEDIES IS CRITICAL TO ASSESSING LOCAL GOVERNMENT LIABILITY

A. Generally, Because Punitive Remedies Penalize Innocent Taxpayers and Threaten Disruption of Government Services, Local Governments Are Immune From Them

In determining whether states are liable "persons" under the FCA, the Second Circuit, as well as the other circuits that examined the issue, focused on the issue of congressional intent. See *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195, 203-08 (2d Cir. 1998); *United States ex rel. Long v. SCS Business and Technical Institute, Inc.*, ___ F.3d ___, 1999 U.S. App. LEXIS 5950 at *10-30 (D.C. Cir. 1999); *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 874-75 (8th Cir. 1998). Congressional intent is also central to an analysis of the FCA's applicability to local governments: if the FCA is considered punitive in nature, local governments are immune from liability unless Congress clearly intends to abrogate that immunity. Cf. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (under § 1983 of the Civil Rights Act of 1851, no punitive damages may be awarded against municipalities because Congress did not intend to subject municipalities to punitive damages).

The reason for this common law immunity from punitive damages is simple: punishment should be imposed only against actual wrongdoers. *Id.* at 261. To the extent a punitive award is allowed against a local government, however, it punishes the general public, not the individual wrongdoer. *Genty v. Resolution Trust Corporation*, 937 F.2d 899 (3rd Cir. 1991). Moreover, the goal of deterrence is not served by imposing punitive sanctions against a locality, because such sanctions are not likely to restrain future violations by individual actors; the award would not come from their pockets. *Id.* at 910. Punitive remedies imposed on a locality are in effect a "windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *City of Newport*, 453 U.S. at 261.

While traditionally local government immunity from remedies that punish has arisen in the context of punitive damages, this Court has applied the same principles to other civil remedies that may be viewed as punishment, including treble damages. As this Court commented in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981), a case brought under the Clayton Act, "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct . . ."² In *City of*

² This Court also considers civil penalties to be punitive under common law principles. See *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992) (civil penalties under the Clean Water Act and the Resource Conservation and Recovery Act of 1976 intended as punishment); *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) ("the remedy of civil penalties is similar to the remedy of punitive damages").

Newport, this Court relied on *Hunt v. City of Boonville*, 65 Mo. 620 (1877), a case exempting municipalities from treble damages under a state trespass statute, because such damages would penalize innocent taxpayers. 453 U.S. at 261. See also *Genty*, 937 F.2d 899 (municipalities not liable under RICO because of treble damages remedy); *Barnier v. Szentmiklosi*, 810 F.2d 504 (6th Cir. 1987) (treble damages not allowed against a municipality under Michigan false arrest statute).

Thus, on its face, the FCA's remedies of treble damages and a \$5000 to \$10,000 penalty for each false claim appear punitive. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. J. 1795, 1860 (June 1992) (in 1986, by increasing the FCA's double damages to treble damages and raising the penalties, Congress was instituting "new punitive sanctions").

B. The Circuits Are in Direct Conflict Over Whether The FCA Imposes Punitive Remedies

In arguing that a state is not a "person" under the FCA, the state defendants asserted that Congress did not clearly express its intention to subject states to liability, and that this congressional intent must be crystal clear because in common usage, the term "person" does not include states. *Stevens*, 162 F.3d at 203; *Long*, 1999 U.S. App. LEXIS 5950 at *7-10; *Zissler*, 154 F.3d at 11. As a corollary, the states argued that courts have not ordinarily imposed punitive remedies against states, so the fact that the FCA's remedies are punitive provides further evidence that Congress did not intend states to be defendants under that statute. *Stevens*, 162 F.3d at 207; *Long*, 1999 U.S. App.

LEXIS 5950 at *19-20; *Zissler*, 154 F.3d at 873. In the context of determining whether states are "persons" under the FCA, therefore, the circuits discussed whether the statute is punitive, parting ways completely on this issue.

The D.C. Circuit in *Long* addressed the issue of the punitive nature of the statute, because the state had argued that the statute's remedies "created a form of punitive damages that would be palpably inconsistent with state liability." *Long*, 1999 U.S. App. LEXIS 5950 at *19. Looking back to the intent of Congress when it enacted the statute in 1863, the D.C. Circuit commented: "The 1863 Congress . . . made clear as day that it intended criminal, and a fortiori punitive, sanctions Those provisions are surely inconsistent with the concept of state liability." *Id.* at 20. Further, the court pointed out that the statute could be characterized as remedial only prior to the 1986 amendments, when the statute provided for double damages of which the government only received a one-half share. *Id.* at *19, citing *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 349 n.3 (S.D.N.Y. 1998) (district court held that states and municipalities were not persons under the FCA and that the statute was punitive).³ By implication, the court reasoned, once the statute was amended to increase the penalties to treble damages and decrease the relator's share, it was no longer merely making "the government whole." *Id.*

³ The D.C. Circuit in *Long* relied heavily on the district court's analysis in *Graber* in determining that Congress did not intend states to be liable under the FCA, although it noted that "[o]f course, *Stevens*, not *Graber*, is Second Circuit law." *Long*, 1999 U.S. App. LEXIS 5950 at *13 n.7.

In contrast, in this case, the Second Circuit rejected the state's argument that the treble damages and penalties of the FCA are punitive and that the statute therefore did not authorize suits against states. *Stevens*, 162 F.3d at 207. In a cursory discussion, the Second Circuit explained that the double damages in the 1863 FCA were remedial, enacted in order to fully compensate the government for its losses. *Id.* However, the Second Circuit never even mentioned the issue that the D.C. Circuit found critical -- whether the change to treble damages and escalation of penalties made the statute punitive.

Applying different reasoning, the Eighth Circuit in *Zissler* rejected the argument that the FCA's remedies "alter the usual constitutional balance of federalism because they are extracompensatory." *Zissler*, 154 F.3d at 873. Without citation, the court determined that, while private citizens may not necessarily recover more than compensatory damages from states, the federal government is not so restricted. *Id. Contra Graber*, 8 F. Supp. 2d at 350-351. The court in *Zissler* further stated that FCA's remedies were compensatory rather than punitive, citing an Eighth Circuit double jeopardy case which held that an FCA civil suit did not bar a subsequent criminal prosecution. *Id.*, citing *United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996), *cert. denied*, 520 U.S. 1132 (1997). In citing a double jeopardy case, however, the court in *Zissler* did not consider, as the court in *Graber* had, the distinction between "punitive" civil sanctions for the purpose of the Double Jeopardy Clause and punitive sanctions for the purpose of governmental immunity from suit. *See Graber*, 8 F. Supp. 2d at 350, citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943) (despite the fact that multiple civil damages provided for in the False Claims Act

are akin to punitive or exemplary damages, for purposes of the application of the Double Jeopardy Clause, they do not constitute a criminal penalty or cause the remedy to lose the quality of a civil action).

Both in approach and result, therefore, the three Circuits that considered whether the FCA's remedial structure is punitive differed completely. Since this issue is highly relevant to state liability and its resolution is critical to assessing local government liability under the FCA, this Court should resolve it by granting Vermont's petition.

II

RESOLUTION OF THE CIRCUITS' CONFLICT OVER CONGRESSIONAL INTENT IS CRITICAL TO ASSESSING LOCAL GOVERNMENT LIABILITY

Where a statute is found to be punitive, local governments are immune from liability unless Congress clearly intended to abrogate that immunity. *City of Newport*, 452 U.S. at 261. The Second Circuit in this case, the Eighth Circuit in *Zissler* and the D.C. Circuit in *Long* all analyzed congressional intent under the FCA as reflected in the statute's language and legislative history to determine whether Congress contemplated state liability. In several critical places, the FCA's language and legislative history discuss states and political subdivisions together. *See* 31 U.S.C. §§ 3732(b); 3733(a)(1); S. Rep. No. 99-345, 99th Cong., 2d Sess. 8-9, *reprinted in* 1986 U.S.C.C.A.N. 5273-74. As a result, the reasoning of all three circuits concerning congressional intent to subject states to liability is significant to local governments.

Specifically, in discussing the statutory language, the Second Circuit's conclusion that states are "persons" subject to liability was based on its determination that states are persons under other FCA provisions and that, ordinarily, the same word means the same thing throughout the statute. *Stevens*, 162 F.3d at 205. *Accord Zissler*, 154 F.3d at 875. The Second Circuit relied on the fact that first, courts have allowed states to be relators under the provision that a "person" may bring a civil action for a violation of the FCA; *Stevens*, 162 F.3d at 204-05; second, the FCA contains a provision that allows states and local governments to join state law claims with FCA claims, 31 U.S.C. § 3732(b); *Id.* at 205; and third, states are explicitly stated to be "persons" (along with their political subdivisions) subject to pre-complaint discovery under the FCA's civil investigative demand ("CID") section. 31 U.S.C. § 3733(a)(1), *Id.* at 207.

The D.C. Circuit in *Long* disagreed explicitly with the Second Circuit on each and every one of these points. First, it argued that the fact that courts have allowed states to be relators does not indicate that was Congress's intent.⁴

⁴ Amici believe that Congress's intent was to allow states and local government to be relators, and that this is not inconsistent with its intent to exclude states and local governments from liability under the FCA. The definition of "person" in § 3729 is different from the definition of "person" in § 3730. Section 3730(e) specifically defines which persons may be relators and excludes several categories of persons, but does not exclude states and local governments. It is basic statutory construction that "the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908, 913 (E.D. Va. 1989).

(continued)

Second, it read § 3732(b) as permitting intervention by states for recovery of state funds, rather than allowing states to be relators. Third, it pointed out that the listing of "states" as "persons" subject to civil investigative demands includes the caveat "for purposes of this section," so it cannot be construed to subject states to liability as "persons" in a different section of the Act. Moreover, the D.C. Circuit found that distinction quite logical: "It seem rather obvious, however, that states could provide useful evidence to establish that private contractors, for example, made false claims." *Long*, 1999 U.S. App. LEXIS 5950 at *4-*6.

The three circuits' views of the FCA's legislative history also evidence profound disagreement. Both the Second and Eighth Circuits claimed legislative history support for their conclusion that Congress intended state liability under the Act. According to the Second Circuit, the 1863 Congress was concerned about all kinds of fraud perpetrated on the federal government, including fraud by state officials. This conclusion was based on the publication of a House Report in 1862 which specifically had noted the problem of state officials' participation in fraudulent activities. *Stevens*, 162 F.3d at 206. The Eighth Circuit emphasized the 1986 amendments' purpose to make the statute a more useful tool to combat fraud, so that it should be construed to reach states as potential defendants, since states receive a significant amount of federal funding. *Zissler*, 154 F.3d at 874.

⁴ (...continued)
(citations omitted). In contrast, no specific exclusions are contained in § 3729, the liability provision of the FCA.

Countering these arguments, the D.C. Circuit first explained that the fraud of state officials referred to in the 1862 House Report was not committed against the United States government, and that, in any event, this piece of legislative history was not linked to the passage of the FCA. *Long*, 1999 U.S. App. LEXIS 5950 at *14. Second, it argued, the broad purpose of the FCA to counter fraud cannot be sufficient to answer the question of whether states were made potential defendants under the FCA, particularly since Congress's primary concern in 1863 was to address frauds perpetrated by private military contractors. *Id.* at *11-12. Third, it considered the *Zissler* court's point that an effective anti-fraud statute would subject states to liability simply because they receive a substantial amount of money from the federal government "similarly unpersuasive," *id.* at *12. It reasoned that a court's role in examining congressional intent is "not to 'engraft on a statute additions which [the court] thinks the legislature logically might or should have made.'" *Id.*, quoting *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).

Finally, both the Second and Eighth Circuits relied on a section in the Senate report accompanying the 1986 amendment to the FCA, which, in describing the "history of the FCA," states that "the False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations and corporations . . . as well as States and political subdivisions thereof." *Stevens*, 162 F.3d at 207, quoting S. Rep. No. 99-345, 99th Cong., 2d Sess. 8-9, reprinted in 1986 U.S.C.C.A.N. 5266, 5273-74. See also *Zissler*, 154 F.3d at 874-75.

The D.C. Circuit, however, pointed out that this portion of the Senate Report was utterly unconnected to any of the substantive amendments made by the 1986 Congress; it was merely a "legislative observation about what § 3729(a), enacted by an earlier Congress, means. Such post-enactment legislative history is of no import when the subsequent Congress takes on the role of a court and in a report asserts the meaning of a prior statute." *Long*, 1999 U.S. App. LEXIS 5950 at *21-22, citing *Pierce v. Underwood*, 487 U.S. 552, 566 (1988). Moreover, the court reasoned, because the Report only was attempting to describe the way in which the Supreme Court had interpreted the Act, and it was completely wrong in its analysis, "the Report is of no legal significance," *Long*, 1999 U.S. App. LEXIS 5950 at *23. Accord *Graber*, 8 F. Supp. 2d at 353-54.

Thus, in looking at the statutory language and legislative history of the FCA, the three circuits could not have diverged more. The resolution of their debate has profound implications for local governments, since Congress consistently discussed states and their political subdivisions in the same breath. Once this Court resolves the circuits' split over whether states are "persons" under the FCA, it necessarily will settle the closely-linked question of local government liability under that statute as well.

III

ALLOWING LOCAL GOVERNMENT LIABILITY UNDER THE FCA THREATENS DISRUPTION OF GOVERNMENT SERVICES AND UNDERMINES THE COOPERATIVE RELATIONSHIP AMONG THE UNITED STATES, STATES AND LOCALITIES

Resolution of the issues presented in this case is critical to local governments. Local governments are unlike private corporations. Treating them the same under the FCA threatens disruption of government services and undermines the cooperative partnership among different levels of government. Rather than pursuing federal monies for profit, local governments apply for and utilize federal funds for the benefit of their citizens. They do so in cooperation with states and the federal government, sharing both legal and financial responsibility for implementing a wide variety of government programs. While the federal government and states monitor and fund many government programs, it is the unique role of local governments to implement those programs and provide direct services.

Because of the range of services provided by cities with federal financial support, however, all of these services are targets under the FCA. In recent years, there has been a dramatic increase in the number of FCA suits against local governments, exposing those governments and their taxpayers to litigation costs, the risk of draconian remedies and the threatened disruption of government services. Such suits, which are rarely joined by the United States, interfere with statutory procedures for administration designed to ensure both compliance with federal requirements and the

provision of government services. As it stands now, due to the conflict in the circuits, FCA suits can go forward against states and localities in parts of the country even when the United States has suffered no damages, has declined to intervene, has exercised administrative remedies to correct possible violations, and/or has concluded that there was no fraud involved.

For example, in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997), a relator alleged improper reporting to the Department of Housing and Urban Development ("HUD") by the County of Delaware concerning the transfer of a parcel of land. Apart from the FCA action, HUD investigated the land transfer and concluded that the County owed HUD approximately \$2 million. Ultimately, HUD and the County settled their dispute, with the County agreeing to remit a check to HUD, and HUD in turn consenting to return the funds to the County's line-of-credit so that the monies would be available to fund eligible activities. The United States specifically declined to join the FCA suit, concluding that the matters raised in the relator's complaint did not constitute fraud. *Id.* at 739. The Third Circuit refused to dismiss the case despite HUD's settlement with the County (*id.* at 738-39), thereby throwing a wrench into the cooperative relationship between the two levels of government. As a result of the court's decision, the relator stood to recover a bounty for himself and deprive the County of three times the amount of money that the County allegedly had improperly failed to remit to HUD, notwithstanding the settlement with HUD and the United States' conclusion that no fraud had occurred.

Similarly, in *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999), a relator charged that Green Bay's federally funded school bus operations violated federal regulations related to bus maps and stopping policies. The relator first filed a formal complaint with the Federal Transit Administration ("FTA"), which cited the City for violations and threatened to discontinue federal funding. Subsequently, the FTA approved the City's annual grant application notwithstanding the fact that it had not yet achieved full regulatory compliance. In the meantime, the relator brought an FCA action in which the United States declined to intervene. Thereafter, the FTA reported that Green Bay had come into full regulatory compliance. While the court eventually granted summary judgment for Green Bay, the City was nonetheless forced to defend a lawsuit over an issue it had already resolved with the federal government, and where it had eventually come into complete compliance. As in *Dunleavy*, the FCA suit interfered with the cooperation between the federal government and the locality and threatened the operation of a vital government program.

Finally, even in a case where the United States did intervene, *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998), application of the FCA to a state and municipality threatened to undermine Congress's scheme for providing foster care services. See 42 U.S.C. § 671 *et seq.* *Graber* principally involved allegations that New York City and State claimed federal foster care funds even though they did not provide all of the federally required services. However, as the court noted, "no suggestion" was made in the case that "any state or local official personally profited from the alleged fraud. Rather, all the monies apparently were used for the foster

care program." *Id.* at 356. Despite this fact, the federal government sought through the FCA to recoup three times the amount of federal funds claimed and to give a substantial portion of that recovery to the relator, an individual city employee. By contrast, the remedy established by Congress mandates that, even if substantial problems in a state's foster care program are found in a compliance review, the federal agency has no discretion to withhold foster care funds upon successful completion of corrective action. 42 U.S.C. § 1320a-1a(4).

In sum, invocation of the FCA against localities undermines the cooperative mechanisms established by Congress to foster the efficacious delivery of government services, threatening the disruption of those services through the imposition of draconian remedies mandated by the statute. Ultimately, this issue of federalism goes to the core of our governmental system, and it should be resolved by this Court.

CONCLUSION

The State of Vermont's petition for a writ of certiorari should be granted.

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v.

UNITED STATES OF AMERICA EX REL.
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On Writ Of Certiorari To The United States
Court Of Appeals For The Second Circuit

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United States of America

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Certiorari Granted June 24, 1999

44 pp

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DOCKET ENTRIES

STAYED BURL

U.S. District Court
District of Vermont (Brattleboro)

CIVIL DOCKET FOR CASE #: 95-CV-161

Filed: 05/26/95

Stevens, et al v. VT, State of, et al
Assigned to: Chief Judge J. Garvan Murtha
Demand: \$0,000 Nature of Suit: 890
Lead Docket: None Jurisdiction: US Plaintiff
Dkt# in other court: None

Cause: 31:3729 False Claims Act

JONATHAN H. STEVENS, United
States of America ex rel
plaintiff

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v.

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Natural Resources
defendant

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Proceedings include all events.

1:95cv161 Stevens, et al v. VT, State of, et al

5/26/95 1 COMPLAINT; filing fee \$ 120 receipt # 7356 (pjd) [Entry date 05/30/95]
5/26/95 2 MOTION by plaintiff Sealed 1 for an ex parte order granting leave to file complaint in camera and under Seal (pjd) [Entry date 05/30/95]
6/6/95 3 CERTIFICATE OF SERVICE by plaintiff Sealed 1 (lan) [Entry date 06/06/95]
6/19/95 4 ORDER, case reassigned to Judge J. G. Murtha (Judge Fred I. Parker) Cy to parties (pjd) [Entry date 06/21/95]
6/19/95 - File sent to Burlington (pjd) [Entry date 06/21/95]
7/20/95 5 MOTION to Seal by U.S. (pjd) [Entry date 07/20/95]
7/20/95 6 IN CAMERA MOTION to Extend the 60 day sealing and intervention period by govt (pjd) [Entry date 07/21/95] [Entry date 07/21/95]

7/27/95 7 IN CAMERA ORDER granting [5-1] motion to Seal, granting [6-1] motion to Extend the 60 day sealing and intervention period to at least 9/23/95, relator is directed not to serve complaint until further order of this Court (Chief Judge J. G. Murtha) Cy to parties (pjd) [Entry date 07/27/95]
9/19/95 8 IN CAMERA MOTION Sealed (amn) [Entry date 09/22/95]
9/19/95 9 MOTION Sealed (amn) [Entry date 09/22/95]
9/26/95 - File sent to Rutland (amn) [Entry date 09/26/95]
9/26/95 10 ORDER granting [9-1] motion Sealed, granting [8-1] motion Sealed (Chief Judge J. G. Murtha) Cy to parties (amn) [Entry date 09/26/95]
11/9/95 11 MOTION by plaintiff Sealed 1 sealed document (amn) [Entry date 11/13/95] [Edit date 11/13/95]
11/9/95 12 MOTION by plaintiff Sealed 1 to Seal (amn) [Entry date 11/13/95]
11/13/95 - File sent to Brattleboro (amn) [Entry date 11/13/95]
11/17/95 13 ORDER granting [12-1] motion to Seal, granting [11-1] motion sealed document. Realtor [sic] is directed not to serve the complaint on the deft until further order of the Court (Chief Judge J. G. Murtha) Cy to parties (wjf) [Entry date 11/17/95]
11/17/95 - File sent to Rutland (wjf) [Entry date 11/17/95]

- 1/30/96 14 MOTION by defendant Sealed 2 to Seal (lan) [Entry date 01/31/96]
- 1/30/96 15 MOTION by defendant Sealed 2 to Extend The Sealing and Intervention Period (lan) [Entry date 01/31/96]
- 1/31/96 - File sent to Brattleboro (wjf) [Entry date 01/31/96]
- 2/1/96 16 ORDER granting [15-1] motion to Extend The Sealing and Intervention Period, granting [14-1] motion to Seal complaint. Complaint not to be served until further order of the Court (Chief Judge J. G. Murtha) Cy to parties (wjf) [Entry date 02/02/96]
- 2/2/96 - File sent to Rutland (wjf) [Entry date 02/02/96]
- 4/10/96 17 MOTION by defendant Sealed 2 to Seal (wjf) [Entry date 04/10/96]
- 4/10/96 18 MOTION by defendant Sealed 2 to Extend the Sealing and Intervention Period (wjf) [Entry date 04/10/96]
- 4/15/96 19 ORDER granting [18-1] motion to Extend the Sealing and Intervention Period, granting [17-1] motion to Seal (Chief Judge J. G. Murtha) Cy to parties (amn) [Entry date 04/15/96]
- 5/24/96 20 MOTION by defendant Sealed 2 to Seal (lan) [Entry date 05/24/96]
- 5/24/96 21 IN CAMERA MOTION by defendant Sealed 2 SEALED (lan) [Entry date 05/24/96] Edit date 05/28/96]
- 5/29/96 22 MOTION by plaintiff Sealed 1 to Seal (amn) [Entry date 05/29/96]

- 5/29/96 23 MOTION by plaintiff Sealed 1 Sealed (amn) [Entry date 05/29/96]
- 5/29/96 - File sent to Brattleboro (amn) [Entry date 05/29/96]
- 5/31/96 - ENDORSED ORDER: granting [20-1] motion to Seal (Chief Judge J. G. Murtha) (amn) [Entry date 05/31/96]
- 5/31/96 24 ORDER granting [22-1] motion to Seal, granting [21-1] motion SEALED (Chief Judge J. G. Murtha) Cy to parties (amn) [Entry date 05/31/96]
- 6/26/96 25 MOTION by defendant Sealed 2 to Seal (lan) [Entry date 06/27/96]
- 6/26/96 26 NOTICE (SEALED) of election To Decline Intervention and Motion To Extend Seal by defendant Sealed 2 (lan) [Entry date 06/27/96]
- 7/1/96 27 MOTION by pltf Sealed 1 to Extend the Seal for 30 Days (kac) [Entry date 07/01/96]
- 7/1/96 28 MOTION by pltf Sealed 1 to Seal p#27 (kac) [Entry date 07/01/96]
- 7/19/96 29 MOTION by plaintiff Sealed 1 to Withdraw [22-1] motion to Seal (wjf) [Entry date 07/19/96]
- 7/19/96 30 NOTICE of intent to withdraw subpoena by plaintiff Sealed 1 (wjf) [Entry date 07/19/96]
- 7/30/96 - ENDORSED ORDER: granting [22-1] motion to Seal (Chief Judge J. G. Murtha) (wjf) [Entry date 07/30/96]

- 7/30/96 - ENDORSED ORDER: finding the motion Sealed [23-1] denied as moot (Chief Judge J. G. Murtha) (wjf) [Entry date 07/30/96]
- 7/30/96 - ENDORSED ORDER: granting [25-1] motion to Seal (Chief Judge J. G. Murtha) (wjf) [Entry date 07/30/96]
- 7/30/96 - ENDORSED ORDER: finding the motion to Extend the Seal for 30 Days [27-1] denied as moot (Chief Judge J. G. Murtha) (wjf) [Entry date 07/30/96]
- 7/30/96 - ENDORSED ORDER: granting [28-1] motion to Seal p#27 (Chief Judge J. G. Murtha) (wjf) [Entry date 07/30/96]
- 7/30/96 - ENDORSED ORDER: granting [29-1] motion to Withdraw [22-1] motion to Seal (Chief Judge J. G. Murtha) (wjf) [Entry date 07/30/96]
- 7/30/96 31 ORDER, USA has declined to intervene, seal lifted on complaint, all other contents of Court's file remain under seal, seal lifted as to all other matters occurring after the date of this ORDER case unsealed. (Chief Judge J. G. Murtha) Cy to parties (wjf) [Entry date 07/30/96]
- 7/30/96 - File sent to Rutland (wjf) [Entry date 07/30/96]
- 11/14/96 32 RETURN OF SERVICE executed as to defendant Vermont, State of on 11/7/96 (wjf) [Entry date 11/14/96]
- 11/25/96 33 CERTIFICATE OF SERVICE by plaintiff USA (Sealed by Order of Court) (wjf) [Entry date 11/25/96]

- 11/26/96 34 NOTICE OF APPEARANCE for defendant Vermont, State of by David M. Rocchio (wjf) [Entry date 11/26/96]
- 11/26/96 35 MOTION by defendant Vermont, State of to Extend Time to 2/25/97 to answer complaint (wjf) [Entry date 11/26/96]
- 11/26/96 - File sent to Brattleboro (wjf) [Entry date 11/26/96]
- 12/5/96 - File sent to Rutland (amn) [Entry date 12/05/96]
- 12/5/96 - ENDORSED ORDER: granting [35-1] motion to Extend Time to 2/25/97 to answer complaint, Answer due on 2/25/97 for Vermont, State of (Chief Judge J. G. Murtha) Cy to parties (amn) [Entry date 12/05/96]
- 2/19/97 36 MOTION by defendant Vermont, State of to Extend Time to respond to complaint to 3/25/97 (amn) [Entry date 02/19/97]
- 2/19/97 - File sent to Brattleboro (amn) [Entry date 02/19/97]
- 2/21/97 - ENDORSED ORDER: granting in part, denying in part [36-1] motion to Extend Time to respond to complaint to 3/25/97, Answer due on 3/18/97 for Vermont, State of (Chief Judge J. G. Murtha) Cy to parties (amn) [Entry date 02/21/97]
- 2/21/97 - File sent to Rutland (amn) [Entry date 02/21/97]
- 3/18/97 37 MOTION by defendant Vermont, State of to Dismiss Complaint (wjf) [Entry date 03/18/97]

- 3/18/97 38 MEMORANDUM by defendant Vermont, State of in support of [37-1] motion to Dismiss complaint (wjf) [Entry date 03/18/97]
- 3/18/97 - File sent to Brattleboro (wjf) [Entry date 03/18/97]
- 3/21/97 39 MOTION with memorandum in support by plaintiff USA to Extend Time to 5/2/97 to respond to Motion to Dismiss (wjf) [Entry date 03/21/97]
- 3/25/97 - ENDORSED ORDER: granting [39-1] motion to Extend Time to 5/2/97 to respond to Motion to Dismiss, [37-1] response deadline to motion to Dismiss Complaint reset to 5/2/97. (Chief Judge J. G. Murtha) Cy to parties (amn) [Entry date 03/25/97]
- 3/25/97 40 REPLY (In letter form) by defendant Vermont, State of to [39-1] motion to Extend Time to 5/2/97 to respond to Motion to Dismiss (amn) [Entry date 03/25/97]
- 5/2/97 41 MEMORANDUM by plaintiff USA in opposition to [37-1] motion to Dismiss Complaint (pjd) [Entry date 05/02/97]
- 5/2/97 42 OPPOSITION by relator Jonathan Stevens on behalf of plaintiff USA to [37-1] motion to Dismiss Complaint (pjd) [Entry date 05/02/97]
- 5/9/97 - File sent to Rutland (amn) [Entry date 05/09/97]
- 5/9/97 43 ORDER denying motion to Dismiss Complaint [37-1] (Chief Judge J. G. Murtha) Cy to parties (amn) [Entry date 05/09/97]

- 5/19/97 44 MOTION by defendant Vermont, State of for Reconsideration of [43-1] order denying motion to dismiss (amn) [Entry date 05/19/97]
- 5/19/97 45 MEMORANDUM by defendant Vermont, State of in support of [44-1] motion for Reconsideration of [43-1] order denying motion to dismiss (amn) [Entry date 05/19/97]
- 5/19/97 46 REPLY by defendant Vermont, State of to oppositions to [37-1] motion to Dismiss Complaint (amn) [Entry date 05/19/97]
- 5/19/97 - File sent to Brattleboro (amn) [Entry date 05/19/97]
- 5/27/97 47 TRIAL CALENDAR court trial set for 7/8/97 as the # 4 case Cy to counsel (cab) [Entry date 05/27/97]
- 6/3/97 48 AMICUS CURIAE MEMORANDUM by plaintiff USA in opposition to [44-1] motion for Reconsideration of [43-1] order denying motion to dismiss (amn) [Entry date 06/03/97]
- 6/4/97 49 ATTACHMENT by plaintiff USA to [48-1] opposition memorandum, [44-1] motion for Reconsideration of [43-1] order denying motion to dismiss (amn) [Entry date 06/04/97]
- 6/5/97 50 MEMORANDUM by plaintiff USA (Relator Jonathan Steven [sic]) in opposition to [44-1] motion for Reconsideration of [43-1] order denying motion to dismiss (amn) [Entry date 06/05/97]
- 6/6/97 51 NOTICE OF APPEAL by defendant Vermont, State of re: [43-1] order Fee Status:

- \$105 paid, Rcpt#02711 Cy to Judge J. Garvan Murtha, appellate clerk, David M. Rocchio for defendant Vermont, State of, Tristram J. Coffin for plaintiff USA, Matthew Edwin Claude Pifer for plaintiff USA (wjf) [Entry date 06/06/97]
- 6/6/97 52 MOTION by defendant Vermont, State of to Stay Pending Appeal (wjf) [Entry date 06/06/97]
- 6/6/97 53 MEMORANDUM by defendant Vermont, State of in support of [52-1] motion to Stay Pending Appeal (wjf) [Entry date 06/06/97]
- 6/9/97 54 FORMS C AND D re: [51-1] appeal by Vermont, State of (pjd) [Entry date 06/09/97]
- 6/11/97 55 DESIGNATION OF RECORD on appeal by defendant Vermont, State of re: [51-1] appeal by Vermont, State of (pjd) [Entry date 06/11/97]
- 6/11/97 - ENDORSED ORDER: granting [44-1] motion for Reconsideration of [43-1] order denying motion to dismiss. Upon reconsideration, the Court's prior ruling is affirmed. (Chief Judge J. G. Murtha) Cy to parties (amn) [Entry date 06/11/97]
- 6/16/97 56 MOTION (Renewed) by plaintiff USA to Stay Pending Appeal (wjf) [Entry date 06/16/97]
- 6/16/97 57 AMENDED NOTICE OF APPEAL by defendant Vermont, State of re: [0-0] endorse order, [43-1] order Cy to Judge J. Garvan Murtha, appellate clerk, David M. Rocchio for defendant Vermont, State of,

- Tristram J. Coffin for plaintiff USA, Matthew Edwin Claude Pifer for plaintiff USA, (wjf) [Entry date 06/16/97]
- 6/23/97 58 MEMORANDUM by relator Jonathan Stevens in opposition to [52-1] motion to Stay Pending Appeal (pjd) [Entry date 06/23/97]
- 6/25/97 59 REPLY by defendant Vermont, State of to response to [52-1] motion to Stay Pending Appeal (amn) [Entry date 06/25/97]
- 6/30/97 - File sent to Rutland (amn) [Entry date 06/30/97]
- 6/30/97 60 ORDER granting [56-1] motion to Stay Pending Appeal, granting [52-1] motion to Stay Pending Appeal, CASE STAYED pending appeal (Chief Judge J. G. Murtha) Cy to parties (amn) [Entry date 06/30/97] [Edit date 08/11/98]
- 7/7/97 61 SUPPLEMENTAL DESIGNATION OF RECORD on appeal by defendant Vermont, State of [51-1] appeal by Vermont, State of (pjd) [Entry date 07/07/97]
- 9/17/97 62 ATTORNEY SUBSTITUTION terminating attorney David M. Rocchio for Vermont, State of and substituting attorney Ronald Albert Shems (amn) [Entry date 09/17/97]
- 9/19/97 63 SCHEDULING ORDER #1 re: [51-1] appeal by Vermont, State of USCA Number 97-6141; Conference set: 10/17/97; Index to Record Due 10/22/97. (cwb) [Entry date 09/19/97]
- 10/27/97 - CERTIFIED AND TRANSMITTED INDEX to USCA re: [57-1] appeal by Vermont,

- State of. Parties notified. (cwb) [Entry date 10/27/97]
- 10/27/97 - File sent to Burlington (wjf) [Entry date 10/27/97]
- 2/9/98 - CERTIFIED AND TRANSMITTED record on appeal to USCA re: [51-1] appeal by Vermont, State of. (cwb) [Entry date 02/09/98]
- 2/9/98 - File sent to USCA (cwb) [Entry date 09/04/98]
- 4/26/99 64 MANDATE entered 12/07/98; issued 04/22/99; AFFIRMING judgment of district court re: appeal [51-1] in accordance with the opinion of this court [copy attached]. (cwb) [Entry date 04/26/99]
- 5/4/99 65 REPLY (letter form) by defendant State of Vermont re: case status of appeal pursuant to [60-1] order staying case pending appeal (pls) [Entry date 05/04/99]
- 5/7/99 - ENDORSED ORDER: Construed as a motion to extend stay, granting [65-1] reply. Continuation of stay in effect pending final disposition of Vermont's appeals. (Chief Judge J. G. Murtha) (pls) [Entry date 05/07/99]
- 5/26/99 - RECORD ON APPEAL RETURNED re: [57-1] appeal by Vermont, State of, [51-1] appeal by Vermont, State of. (cwb) [Entry date 05/26/99]
- 5/26/99 - File sent to Burlington (cwb) [Entry date 05/26/99]

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GENERAL DOCKET FOR
Second Circuit Court of Appeals

Filed: 6/12/97

Court of Appeals Docket #: 97-6141
Nsuit: 1890 STATUTES-Other
USA v. State of VT
Appeal from: U.S. District Court VTDC

Case type information:

- 1) Civil
- 2) USA as party
- 3) none

Lower court information:

District: 0210-01: 95-cv-161
Trial Judge: J. Garvan Murtha, Chief Judge
Date Filed: 5/26/95
Date order/judgment: 5/9/97
Date NOA filed: 6/6/97

Fee status: paid

Prior cases:

None

Current cases:

None

Panel Assignment:

Panel: ALK JMW JBW 1705 :CA2 2/2/98 am
Date of decision: 12/7/98

Proceedings include all events.

97-6141 USA v. State of VT

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--	---

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FRAUD, THE FALSE
CLAIMS ACT LEGAL
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The False Claims
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Washington, DC 20036

Official Caption 1/

Docket no. (s):97-6141

UNITED STATES OF AMERICA, ex rel. Jonathan Stevens,
qui tam and as relator,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Intervenor,

v.

THE STATE OF VERMONT, AGENCY OF
NATURAL RESOURCES,

Defendant-Appellant.

Authorized Abbreviated Caption 2/

Docket no. (s):97-6141

USA V. STATE OF VT

1/ Fed. R. App. P. Rule 12(a) and 32(a).

2/ For use on correspondence and motions only.

6/12/97 Copy of district court docket entries and notice of appeal on behalf of Appellant VT Natural Resources filed. [97-6141] Form C due on 6/16/97. Form D due on 6/16/97. (ag41)

6/12/97 Copy of receipt re: payment of docketing fee filed on behalf of Appellant VT Natural Resources receipt #: 02711. [97-6141] (ag41)

6/12/97 Appellant VT Natural Resources Form D RECEIVED, with proof of service. [97-6141] (ag41)

6/12/97 Appellant VT Natural Resources Form C filed, with proof of service. [97-6141] Form C deadline satisfied. (ag41)

6/12/97 Appellant VT Natural Resources Form D filed, with proof of service. [97-6141] Form D. deadline satisfied. (ag41)

6/23/97 Notice of Appeal Acknowledgment Letter from David M. Rocchio for Appellant VT Natural Resources received. (ag41)

7/1/97 Notice of Appeal Acknowledgment Letter from Tristram J. Coffin for Appellee USA received. (ag41)

7/1/97 Notice of Appeal Acknowledgment Letter from Matthew Edwin Claude Pifer for Appellee USA received. (ag41)

9/5/97 Scheduling order #1 filed. Record on appeal due on 10/22/97. Appellant's brief and appendix due on 10/29/97. Appellee's brief due on 11/28/97. Argument as early as week of 12/15/97. (Pre-Argument Conference scheduled for Friday October 17, 1997 at 10:30 a.m.). (FS) (ag41)

- 9/5/97 Pre-Argument Conference Notice and Order from Lisa Greenberg filed. (ag41)
- 9/15/97 Letter from Appellants' Counsel concerning unavailability of oral argument and change of address, received. Appellants' counsel will not be available btwn Dec. 22 thru Jan. 5, 1998. (ag41)
- 10/23/97 Amicus Curiae State of New York, Amicus Curiae State of Alaska, Amicus Curiae State of Arizona, Amicus Curiae State of California, Amicus Curiae State of Colorado, Amicus Curiae State of Connecticut, Amicus Curiae State of Delaware, Amicus Curiae State of Hawaii, Amicus Curiae State of Idaho, Amicus Curiae State of Illinois [sic], Amicus Curiae State of Illinois, Amicus Curiae State of Iowa, Amicus Curiae State of Kansas, Amicus Curiae State of Maine, Amicus Curiae State of Maryland, Amicus Curiae State of Michigan, Amicus Curiae State of Mississippi, Amicus Curiae State of Montana, Amicus Curiae State of Nevada, Amicus Curiae State of New Hampsh [sic], Amicus Curiae State of N.C., Amicus Curiae State of Ohio, Amicus Curiae State of Oklahoma, Amicus Curiae State of Texas, Amicus Curiae State of Utah, Amicus Curiae Commonwealth of VA, and Amicus Curiae State of W.V. brief filed with proof of service. (ag41)
- 10/28/97 Notice of appearance form on behalf of David M. Rocchio, Esq., received. (Orig. to Calendar) (in01)
- 10/28/97 Appellant VT Natural Resources brief FILED with proof of service. (ag41)

- 10/28/97 Appellant VT Natural Resources joint appendix filed w/pfs. Number of volumes: 1. (ag41)
- 10/29/97 Record on appeal index in lieu of record filed. (ag41)
- 10/29/97 Amicus Curiae American Council Ed., Amicus Curiae Assn of American Med brief received. Problem: Pending Motion for Leave to File Amicus Brief. (ag41)
- 10/29/97 Amicus Curiae American Council Ed. and Amicus Curiae Assn of American Med. for Leave to File Brief as Amici Curiae, FILED (w/pfs) [1070482-1] (ag41)
- 10/29/97 Amicus Curiae American Council Ed. and Amicus Curiae Assn. of American Med disclosure letter pursuant to FRAP Rule 26.1 RECEIVED. (ag41)
- 10/30/97 Movants Univ. of Minn., Univ. of Michigan, Univ. of California, and Natl Assoc of State Motion for Leave to File Brief Amicus Curiae, FILED. (w/pfs). [1071307-1] (ag41)
- 10/30/97 Movants Univ. of Minn., Univ. of Michigan, Univ. of California, and Natl Assoc of State brief recieved. Problem: Pending Amicus Curiae Motion. (ag41)
- 11/3/97 Order FILED GRANTING motion to participate as amicus [1071307-1] by Movant Univ. of Minn., Univ. of Michigan, Univ. of California, and Natl Assoc of State, endorsed on motion form dated 10/30/97. "IT IS HEREBY ORDERED that the motion be and it hereby is granted." (For the Court: BJM) (ag41)
- 11/3/97 Amicus Curiae Natl Assoc of State, Amicus Curiae Univ. of California, Amicus Curiae

Univ. of Michigan, and Amicus Curiae Univ. of Minn. brief filed with proof of service. (ag41)

- 11/5/97 Amicus Curiae State of New York, Amicus Curiae State of Alaska, Amicus Curiae State of Arizona, Amicus Curiae State of California, Amicus Curiae State of Colorado, Amicus Curiae State of Connecticut, Amicus Curiae State of Delaware, Amicus Curiae State of Hawaii, Amicus Curiae State of Idaho, Amicus Curiae State of Illinois [sic], Amicus Curiae State of Illinois, Amicus Curiae State of Iowa, Amicus Curiae State of Kansas, Amicus Curiae State of Maine, Amicus Curiae State of Maryland, Amicus Curiae State of Michigan, Amicus Curiae State of Mississippi, Amicus Curiae State of Montana, Amicus Curiae State of Nevada, Amicus Curiae State of New Hampsh [sic], Amicus Curiae State of N.C., Amicus Curiae State of Ohio, Amicus Curiae State of Oklahoma, Amicus Curiae State of Texas, Amicus Curiae State of Utah, Amicus Curiae Commonwealth of VA, and Amicus Curiae State of W.V. to Participate in the Oral Argument of the Appeal in support of Appellant, FILED. (w/pfs). [1074631-1] (ag41)
- 11/10/97 Order FILED GRANTING motion to participate as amicus [1070482-1] by Amicus Curiae American Council Ed. and Assn. of American Med, endorsed on motion form dated 10/29/97. "IT IS HEREBY ORDERED, that the motion be and it hereby is granted." (BJM) (ag41)
- 11/10/97 Amicus Curiae American Council Ed. and Amicus Curiae Assn of American Med Brief filed with proof of service. (ag41)

- 11/12/97 Notice of Appeal Acknowledgment Letter from Mark G. Hall for Appellee Jonathan H. Stevens received. (ag41)
- 11/12/97 Notice of appearance form on behalf of Mark G. Hall, Esq., received. (Orig. to Calendar) (ag41)
- 11/21/97 Order FILED REFERRING motion for Amicus Curaie [sic] (State of New York) to participate in oral argument [1074631-1] routed to the panel that will hear the appeal. Order endorsed on motion dated 11/5/97. (BJM) (ag41)
- 11/28/97 Appellee Jonathan H. Stevens brief filed with proof of service. (ag41)
- 12/1/97 Movant USA Motion for Exercise of Attorney General's Right to Intervene, FILED (w/pfs). [1087279-1] (ag41)
- 12/1/97 AUSA brief received. Problem: Pending Motion to Intervene. (ag41)
- 12/1/97 Movant USA Memorandum of Law In Support of Motion to Intervene, FILED. [1087279-1] (ag41)
- 12/1/97 Notice of appearance form on behalf of Douglas N. Letter, Esq., received. (Orig. to Calendar) (ag41)
- 12/1/97 Movant Taxpayers Against motion to file brief as amicus curia [sic], FILED (w/pfs). [1087788-1] (ag41)
- 12/1/97 Taxpayers Against Fraud brief received. Problem: Pending Motion to file amicus brief. (ag41)
- 12/4/97 Order FILED GRANTING motion to Exercise of Attorney General's Right to Intervene

- [1087279-1] by Movant USA, endorsed on motion form dated 12/1/97. (BJM) (ag41)
- 12/4/97 Intervenor USA brief filed with proof of service. (ag41)
- 12/5/97 Order FILED GRANTING motion to file brief as Amicus Curiae [1087788-1] by Movant Taxpayers Against, endorsed on motion form dated 12/1/97. (BJM) (ag41)
- 12/5/97 Order FILED (ag41)
- 12/5/97 Amicus Curiae Taxpayers Against brief filed with proof of service. (ag41)
- 12/15/97 Appellant VT Natural Resources reply brief filed with proof of service. (ag41)
- 12/15/97 Letter from California State University appearing amicus curiae, received. (ag41)
- 12/15/97 Letter frmo [sic] State of Maryland concerning appearing amicus curiae, received. (ag41)
- 12/15/97 Letter from Stuart & Branigin for Purdue University concerning appearing amicus curiae, received. (ag41)
- 12/15/97 Letter from University of Arkansas concerning appearing amicus curiae, received. (ag41)
- 12/15/97 Letter from University of Florida concerning appearing amicus curiae, received. (ag41)
- 12/15/97 Letter from University of Illinois concerning appearing amicus curiae, received. (ag41)
- 12/15/97 Letter from Board of Regents for South Dakota concerning appearing amicus curiae, received. (ag41)
- 12/31/97 Letter sent to : California State University System, Stuart & Branigin, State of Maryland,

- University of Florida, Board of Regents for South Dakota, University of Arkansas, and University of Illinois, informing them that they must file a T-1080 Motion form to appear amicus curiae in the USCA. (ag41)
- 1/6/98 Proposed for argument the week of 2/2/98. (ca91)
- 1/6/98 Set for argument on 2/2/98. [97-6141] (ca91)
- 1/9/98 Order FILED GRANTING motion to allow oral argument for 5 minutes of time [1074631-1] by Amicus Curiae State of New York, State of Alaska, State of Arizona, State of California, State of Colorado, State of Connecticut, State of Delaware, State of Hawaii, State of Idaho, State of Illinois, State of Illinois, State of Iowa, State of Kansas, State of Maine, State of Maryland, State of Michigan, State of Mississippi, State of Montana, State of Nevada, State of New Hampsh [sic], State of N.C., State of Ohio, State of Oklahoma, State of Texas, State of Utah, Commonwealth of VA, State of W.V., endorsed on motion form dated 11/5/97. (ca90)
- 1/23/98 Letter from AUSA concerning more oral argument time, received. (ag41)
- 1/29/98 Appellant VT Natural Resources 28(J) letter FILED. (ag41)
- 2/2/98 Case heard before KEARSE, WALKER C.JJ., WEINSTEIN D.J. (TAPE: #144) (ca95)
- 2/11/98 Record on appeal after index filed. (ag43)
- 3/12/98 Intervenor USA 28(J) letter FILED. (ag41)
- 3/19/98 Appellant VT Natural Resources 28(J) letter FILED. (ag41)

4/6/98 Intervenor USA 28(J) letter FILED. (ag41)

5/4/98 Intervenor USA 28(J) letter FILED. (ag43)

5/19/98 Appellant VT Natural Resources 28 (J) letter FILED. (ag41)

6/16/98 Appellant VT Natural Resources 28 (J) letter FILED. (ag41)

7/1/98 letter from Appellant Vermont's Atty General concerning a changed phone number, received. (ag41)

9/8/98 Intervenor USA 28(J) letter received. [Forwarded To Panel] (ag41)

9/11/98 Appellant VT Natural Resources 28 (J) letter received. [Forwarded To Panel] (ag41)

12/7/98 We Have Considered All Of The State's Arguments On This Appeal And Have Found Them To Be Without Merit. The District Court's Order Denying The State's Motion To Dismiss Is AFFIRMED By Published Signed Opinion Filed. (Per ALK) [97-6141] (ag41)

12/7/98 Judge Weinstein DISSENTING in a separate opinion filed. (ag41)

12/7/98 Judgment filed. (ag41)

12/16/98 Note: The OPINION PRICE is \$10.00 (rek)

1/19/99 Appellant VT Natural Resources petition for rehearing received. Problem: caption is incorrect and District Court Memorandum of law is attached. (ag44)

1/20/99 Appellant VT Natural Resources defective Petition for Rehearing filed. Notice sent to party to correct by 1/27/99. (ag44)

1/27/99 Appellant VT Natural Resources motion to refile petition for rehearing with incorrect caption and attachment FILED (w/pfs). [996516-1] (ag44)

2/2/99 Appellant VT Natural Resources 28(J) letter FILED. (ag44)

2/8/99 Motion Order for permission to refile petition for rehearing with incorrect caption and attachment FILED. Order states "It is hereby ordered that the motion be and it hereby is granted.". For the Court: BJM (ag44)

2/8/99 Notice regarding motion order dated 2/8/99 forwarded to counsel. (ag44)

2/8/99 Appellant VT Natural Resources petition for rehearing en banc [1337504-1] with proof of service filed. (ag44)

2/8/99 Appellant VT Natural Resources defective petition for en banc hearing cured. Satisfy defective document response due. (ag44)

4/13/99 Order FILED DENYING petition petition for rehearing in banc by Appellant VT Natural Resources, endorsed on form dated 2/8/99. (ag44)

4/14/99 Notice regarding denial for petition for rehearing issued to counsel. (ag44)

4/22/99 Judgment MANDATE ISSUED. (ag41)

4/22/99 Notice to counsel regarding issuance of mandate. (ag41)

4/29/99 Mandate receipt returned from the district court. (ree)

- 5/17/99 Notice of filing petition for writ of certiorari dated 5/12/99 filed. Supreme Ct#: 98-1828. (ag44)
- 5/24/99 Record on appeal RETURNED to lower court. No. of volumes: 1 (ref)
- 6/28/99 Letter dated 6/24/99 from the Supreme Court advising of order GRANTING petition for writ of certiorari [1402127-1] endorsed on motion form dated 5/17/99 filed. (Supreme Court #98-6141) (ag44)
-

**UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT**

THE UNITED STATES)	
OF AMERICA,)	
ex rel Jonathan H.)	COMPLAINT UNDER 31
Stevens,)	U.S.C. § 3729-3733 of the
Plaintiff,)	FEDERAL FALSE CLAIMS
)	ACT
v.)	
THE STATE OF)	
VERMONT AGENCY OF)	
NATURAL RESOURCES,)	
Defendant.)	

NOW COMES the United States of America, by and through Jonathan H. Stevens *qui tam* as relator, and complains of defendant, alleging as follows:

1. Jonathan H. Stevens is a citizen of the United States and a resident of the State of Vermont.
2. At times material to this action, Mr. Stevens was an employee of the defendant.
3. This suit is brought as a *qui tam* action by Jonathan H. Stevens for himself and as a relator on behalf of the United States of America ("United States") pursuant to 31 U.S.C. § 3730(b)(1).
4. Jurisdiction exists under 31 U.S.C. § 3730(b)(1) and 31 U.S.C. § 3732 because this action seeks remedies on behalf of the United States for violations of 31 U.S.C. § 3729 by the defendant.

5. Venue is proper in this District under 31 U.S.C. § 3732 (a) because the defendant is a division of the government of the State of Vermont and can be found within the State of Vermont and Federal District of Vermont, and acts proscribed by 31 U.S.C. § 3729 occurred within the Federal District of Vermont.

6. The defendant Vermont Agency of Natural Resources ("ANR"), is composed of individual departments, including the Department of Environmental Conservation ("DEC").

7. The DEC is divided into the Office of the General Counsel, the Office of Air and Waste Management and the Office of Water Resources.

8. Each office of DEC is further divided into several divisions; the Office of Water Resources is divided into five (5) divisions, one of which is the Water Supply Division ("WSD").

9. This suit is based upon violations of the Federal False Claims Act by ANR personnel working in the WSD.

10. Upon information and belief, the acts of the WSD herein complained of, were also perpetrated by other divisions within the three (3) Offices of defendant's DEC; including within the office of Air and Waste Management: the Division of Hazardous Waste Management, the Division of Air Quality, and the Division of Solid Waste Management; and within the office of Water Resources: the Division of Environmental Protection.

11. This action is brought on behalf of the United States to recover all damages, penalties and other remedies established by and pursuant to 31 U.S.C.

§§ 3729-3733, and Jonathan H. Stevens claims entitlement to a portion of any recovery obtained by the United States as *qui tam* plaintiff, his costs and attorneys' fees to the full extent authorized by 31 U.S.C. § 3730(d).

12. Based upon information obtained and/or directly observed by Jonathan H. Stevens during the course of his employment with ANR, the defendant knowingly submitted false claims, records and statements to officials of the United States Environmental Protection Agency, Region 1, Grants Information and Management Section ("EPA") to obtain payment or approval for its employee salaries and wages in connection with ground water protection and public water system management projects being financed with funds from the Federal Treasury and administered through EPA.

13. At all material times, the defendant, through the actions of DEC, substantially funded the budget for the WSD during the Federal Fiscal Year ("FFY") with Federal Treasury funds made available through a series of federal grants under at least two federal public acts: the Safe Drinking Water Act and the Clean Water Act.

14. The grants were administered by the EPA and awarded based upon standardized "Applications for Federal Assistance" prepared and submitted by the defendant, through its employees in the DEC.

15. The federal grants provided funds to pay only "allowable costs" incurred by the defendant in connection with the implementation and enforcement of federal laws concerning public water systems.

16. One of the "allowable costs" was salary expenses for work actually performed on an hourly basis by DEC employees in the Water Supply Division.

17. The funds to pay these costs were provided through letters of credit, against which the defendant, its agents or employees, submitted requests on a regular basis to meet salary and wage expenses for state employees working on federally funded public water supply projects.

18. As a state government recipient of federal grants administered by the EPA, the defendant, through its DEC, was subject to certain post-award reporting requirements and standards under 40 C.F.R. Chapter 1, § 31 and OMB Circular A-87.

19. Pursuant to 40 C.F.R. Chapter 1, § 31 and OMB circular A-87, the defendant, through its DEC, was required to support its charges to federal grant funds for salaries and wages of Water Supply Division employees with time and attendance records for individual employees.

20. Under Federal law these records were required to reflect an after-the-fact distribution of the actual activity of each employee.

21. "Time and attendance records" which reflected pre-allocated federal grant work activity by employees (i.e., estimates determined before the services were performed) did not qualify as support for charges to the federal grants, and any charges to federal grant funds based on such pre-determined estimates were not, as a matter of law, "allowable costs" under 40 CFR § 31.22.

22. At or near the beginning of each FFY a numerical funding source code was assigned to each federal grant fund, which, collectively, were to substantially finance the defendant's employee salaries and wages during the upcoming fiscal year.

23. Prior to the beginning of each FFY, the defendant, by and through management level employees within the DEC, estimated and pre-allocated each WSD employee's Federal- and State-funded work activity for the upcoming FFY.

24. The defendant's estimates of WSD employee federally funded work activity were recorded both as fixed percentages of the employee's time to be allocated to particular federal grant funds over the course of the year, and as specific hours on a bi-weekly basis to be attributed to the particular federal grant funds.

25. Prior to the commencement of any work or services performed during the upcoming funding period, the DEC issued written instructions to each employee in the WSD requiring the employee to complete his or her bi-weekly time report so that the report matched the defendant's pre-allocated, pre-determined estimates of the employee's work hours to be attributed to each federal grant fund from which the employee's salary or wages would be paid during the FFY about to begin.

26. These written instructions provided codes for federal grant-funded activities and one code for activities to be paid from the State's general and permit fee fund.

27. The written instructions to each employee indicated that the employee's time reports "need to reflect the spending of these grants."

28. The written instructions did not require or direct the employee to actually work the allotted hours previously assigned to each federal grant-funded project.

29. The instructions neither described nor detailed the type of work to be performed under each federal funding source code.

30. The instructions related only to the preparation and completion of the employee's time report.

31. Each employee in the WSD who received written instructions from the defendant requiring the employee to prepare his or her time report using the defendant's pre-allocated work activity estimates followed the defendant's instructions.

32. These employee time reports were submitted to EPA by the defendant to support and justify its charges to federal grant funds during the federal fiscal year.

33. The DEC did not, and, upon information and belief, never has maintained any accounting procedure to verify that the pre-allocated employee hours assigned to federal grant funding source codes were actually worked.

34. There were never any quarterly or fiscal year-end adjustments to account for, or even identify, discrepancies between hours actually worked and the original pre-determined estimates.

35. The DEC employee wages and salaries based on pre-allocated federal grant work activity did not qualify

as "allowable costs" chargeable to the federal grants under OMB Circular A-87 and violated 40 C.F.R. § 31.22.

36. Employees of the defendant's DEC did not work the hours which were arbitrarily assigned to them, nor did they record the hours they actually worked under each funding code.

37. Employees, including Jonathan H. Stevens, notified their supervisors at the DEC that the bi-weekly time reports were not accurate, and that employees were not working the pre-allocated hours previously assigned to federal funding sources.

38. These employees were instructed by the defendant's management personnel not to change the funding source codes or hours reported under those codes and DEC continued to submit the time reports to EPA for payment from federal grants.

39. The defendant knowingly and continuously submitted false claims to EPA for salary and wage expenses of its employees purporting to show that employees were working on federally-funded projects when, in fact, they were not working the hours as reported by the defendant.

40. The effect of these reports was to create the impression that the defendant's employees within the DEC were spending the full amount of all federal grant funds made available during the fiscal year in which the alleged work activity took place.

41. The defendant's practice of pre-allocating its DEC employee work hours to federally-funded activities during the fiscal year ensured that the entire amount of each federal grant would be "drawn down" against the

various letters of credit through which the federal funds were made available.

42. The defendant's method of drawing down the DEC's federal grant funding during a fiscal year enabled the DEC to maintain or increase its federal grant funding in successive fiscal years because it was able to obtain the subsequent funding using estimates based upon the previous year's reported spending level.

43. Because the previous fiscal year's spending level was obtained with the use of false "time and attendance records," each subsequent Application for Federal Assistance submitted to EPA by DEC which utilized the previous spending level also constituted a separate false claim, submitted to an officer or employee of the United States Government for payment or approval.

44. The United States has been damaged by the misrepresentations and false claims made and submitted by the defendant to EPA in a sum not less than the total amount of federal grant funding obtained by the DEC, the total of which cannot be calculated with precision at this time but represents a substantial financial injury to the United States.

WHEREFORE, the United States is entitled to damages from the State of Vermont Agency of Natural Resources in accordance with the provisions of 31 U.S.C. § 3729-3733, including civil penalties of not more than Ten Thousand Dollars (\$10,000.00) per false claim, of which up to twenty-five percent of both damages and civil penalties combined should be paid to Jonathan H.

Stevens as relator; and to such further relief as is appropriate, including but not limited to the relator's attorneys' fees and costs.

Dated at Burlington, Vermont, this 26th day of May, 1995.

The United States of America, ex
rel Jonathan H. Stevens, *qui tam*
and as relator.

BY: PAUL, FRANK &
COLLINS, INC.

BY: /s/ Stephen J. Soule
Stephen J. Soule, Esq.
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UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF VERMONT

THE UNITED STATES OF)	
AMERICA, ex rel Jonathan H.)	
Stevens,)	Civil Action
Relator,)	No. 1:95-CV-161
)	
v.)	
)	
THE STATE OF VERMONT,)	
AGENCY OF NATURAL)	
RESOURCES,)	
)	
Defendant.)	

Motion for reconsideration is GRANTED. Upon reconsideration, the Court's prior Ruling is AFFIRMED.

Dated at Rutland, Vermont this 10th day of June, 1997.

/s/ J. Garvan Murtha
J. Garvan Murtha,
Chief Judge

SEP 3 1999

OFFICE OF THE CLERK

No. 98-1828

In The
Supreme Court of the United States

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL.
JONATHAN STEVENS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR PETITIONER

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Counsel for Petitioner

65 pp

QUESTIONS PRESENTED

1. Whether a State is a "person" subject to liability under 31 U.S.C. § 3729(a) of the False Claims Act.
2. Whether the Eleventh Amendment precludes a private relator from commencing and prosecuting a False Claims Act suit against an unconsenting State.

PARTIES TO THE PROCEEDING BELOW

The parties in the United States Court of Appeals for the Second Circuit were the plaintiff, Jonathan Stevens, a *qui tam* relator under the False Claims Act, and the Defendant State of Vermont, Agency of Natural Resources. The United States, while listed as a plaintiff, has not participated as a plaintiff at any stage of this matter. The United States intervened in the court of appeals to defend the False Claims Act's constitutionality as applied to the States, and to address Vermont's contention that the False Claims Act does not allow suits to be brought against the States.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-85) is published as *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998). The decision of the United States District Court for the District of Vermont (Pet. App. 86-87) is not published.

JURISDICTION

The court of appeals' decision was entered on December 7, 1998. Rehearing and rehearing *en banc* were both denied on April 13, 1999. Pet. App. 89-90. Vermont's petition for writ of certiorari was filed on May 12, 1999 and was granted on June 24, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The False Claims Act, 31 U.S.C. §§ 3729-3733, is reproduced in the appendix to the petition for certiorari, Pet. App. 91-125.

STATEMENT OF THE CASE

1. The False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, imposes liability on "[a]ny person" who knowingly presents for payment a false or fraudulent claim to the United States. 31 U.S.C. § 3729(a)(1). Such a

person may be required to pay a civil penalty "of not less than \$5,000 and not more than \$10,000" per violation together with "3 times the amount of damages which the Government sustains." 31 U.S.C. § 3729(a). The term "person" as used in § 3729(a) is not defined in the FCA.

As explained in section II.C, below, the FCA specifically delegates to "private persons" the authority to bring "civil action[s] for a violation of section 3729" for themselves and for the United States Government. 31 U.S.C. § 3730(b). Such actions, also known as *qui tam*¹ actions, are brought by the private person "in the name of the Government." *Id.* When a private person files suit under the FCA, the complaint remains sealed for at least 60 days, while the United States decides whether to intervene and proceed with the action. 31 U.S.C. § 3730(b)(2). If the United States chooses not to intervene, the private "person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(b)(4)(B). Regardless of whether the United States intervenes, the private person has the right to continue as a party to the action. 31 U.S.C. § 3730(c)(1).

The private person receives "at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim" if the United States intervenes and "not less than 25 percent and not more than 30 percent of the proceeds" if the United States does not intervene. 31 U.S.C. § 3730(d)(1),(2). The private person is also entitled to costs, expenses, and attorneys' fees. *Id.*

¹ "Qui tam" is the shortened version of the Latin phrase "*qui tam pro domino rege quam pro se imposito sequitur*," which means "who brings the action as well for the king as for himself."

2. Vermont administers and enforces public health and environmental laws including the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, and state laws that implement these federal statutes. *See, e.g.*, Vt. Stat. Ann. tit. 10, chs. 47, 48, 56. These comprehensive public health and environmental protection statutes rely on the States' police powers and the traditional role of the States in our federalist system. *See, e.g.*, 33 U.S.C. § 1251(b) (Clean Water Act) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."). Vermont administers and enforces these statutes in partnership with the Federal Government. *See, e.g.*, 33 U.S.C. § 1329(a),(b) (delegation to States to develop non-point source water pollution prevention programs). This partnership is facilitated through grants provided by the Environmental Protection Agency (EPA) to the Vermont Agency of Natural Resources ("VANR").

The plaintiff, Jonathan Stevens, was employed by VANR for a six-month period ending in January of 1994. He alleges that "[a]t times material to this action, [he] was an employee of the defendant." App. 33. He claims that Vermont's use of pre-approved percentages to account for staff time spent working under EPA grants violated Office of Management and Budget ("OMB") Circular A-87, and thus VANR's employee time records constitute false claims to the Federal Government.² App. 36, 38-39.

² The pertinent provision of OMB Circular A-87 in effect while Stevens was employed by Vermont was issued in 1981 and remained in effect until September 1, 1995. It provides:

Payroll and distribution of time. Amounts charged to grant programs for personal services, regardless of

The plaintiff does not allege, nor could he, that Vermont is not protecting the public health and environment. Moreover, EPA has no complaint with Vermont's administration of these grants. Vermont asked EPA to review the propriety of VANR's procedures in light of the plaintiff's allegations. EPA, with the assistance of the Department of Justice, has reviewed pertinent documents and interviewed several current and former VANR employees. EPA concluded that the procedures in place during the plaintiff's tenure with VANR "complied with the requirements of the 1981 version of Circular A-87, which was in effect until the first awards made after September 1, 1995." Letter from Stephen S. Perkins, EPA to E. Hale Ritchie, VANR (Feb. 20, 1998) (appended to this Brief at App. 1-App. 3). EPA also concluded that although Vermont was in technical non-compliance with the OMB circular from September 1, 1995 until May 25, 1997 - a time outside of the Complaint's scope - "we note that our review did not uncover any improprieties in the time charges during this period." *Id.*

3. On May 26, 1995, Stevens filed suit, under seal, against the State of Vermont under the *qui tam* provisions

whether treated as direct or indirect costs, will be based upon payrolls documented and provided in accordance with generally accepted practice of the State, local, or Indian tribal government. Payrolls must be supported by time and attendance or equivalent records for individual employees. Salaries and wages of employees chargeable to more than one grant program or other cost objective will be supported by appropriate time distribution records. The method used should produce an equitable distribution of time and effort.

OMB Circular No. A-87, Attach. B, § (B)(10)(b), 46 Fed. Reg. 9548, 9552 (1981).

of the FCA. App. 33, 41. He seeks twenty-five percent of treble damages and civil penalties arising out of the allegedly false claims Vermont made to EPA, plus attorneys' fees and costs. App. 40-41. The district court putatively exercised jurisdiction pursuant to 31 U.S.C. §§ 3729, 3730(b), 3732(a) and 28 U.S.C. § 1331. On June 26, 1996, after having conducted the diligent investigation required by 31 U.S.C. § 3730(a), the Federal Government gave notice of its election not to intervene in this matter.

On November 7, 1996, Stevens, exercising his right under the FCA, served the complaint on the State of Vermont, and began prosecuting, on his own behalf and nominally on behalf of the United States, the lawsuit he filed. See 31 U.S.C. § 3730(c)(3). Vermont moved to dismiss the complaint on the grounds that: (1) the district court lacks jurisdiction to entertain Stevens' suit because States are not "persons" subject to liability under the FCA and (2) the FCA's *qui tam* provisions violate the Eleventh Amendment as applied to State defendants. On May 9, 1997, the district court denied Vermont's motion to dismiss. Pet. App. 86-89. On June 10, 1997, the district court denied reconsideration. App. 42.³ The proceedings before the district court have been stayed pending Vermont's appeal to the court of appeals and this Court.

4. On December 7, 1998, a divided court of appeals affirmed the district court's denial of Vermont's motion to dismiss. It held that the Eleventh Amendment does not bar this lawsuit because the United States is the real party in interest and therefore the Eleventh Amendment does

³ Due to a printing error, the order denying reconsideration is not accurately reproduced in the appendix to Vermont's petition for certiorari. The correct version is in the Joint Appendix.

not apply. Pet. App. 18. The court of appeals also held that Congress intended to include States as "persons" subject to suit under the FCA. *Id.* at 30.

Judge Weinstein, sitting by designation, dissented. He concluded that "the False Claims Act unnecessarily upsets a cooperative process essential to American federalism" and thus, Stevens' claim should be barred by the Constitution. *Id.* at 85.

SUMMARY OF THE ARGUMENT

The FCA uses only the undefined term "person" to describe those liable under the Act. 31 U.S.C. § 3729(a). As this Court has repeatedly held, the term "person" does not ordinarily include the sovereign States. *See, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979). Thus, the Court need look no further than the plain language of § 3729(a) to determine that States are not "persons" who may be sued under the Act.

This ordinary meaning of the term "person" is nonetheless reinforced by both the clear statement rule and the doctrine of constitutional doubt. As the FCA would alter the "usual constitutional balance" between the States and the Federal Government, this Court should not interpret the FCA to impose liability on the States absent a clear statement of Congressional intent. *See, e.g., Will*, 491 U.S. at 65. Following the plain meaning of the term "person" as excluding States also permits the Court to avoid a "grave and doubtful constitutional question": whether a suit under the Act commenced and prosecuted against a State by a private person violates the Eleventh Amendment. *See, e.g., United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909).

The purpose and context of the FCA do not support inclusion of States within the term "person." Nothing in the language of the original Act – passed in 1863 as a response to fraud by Civil War contractors – suggests that Congress intended to permit suits against States and subject them to liability for double damages and civil penalties. Although the FCA has subsequently been amended to provide for treble damages and increased civil penalties, the meaning of the term "person" has not changed. These added measures are punitive and are not appropriately assessed against States and other governmental units, thus further indicating that States are not "persons." *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981).

The States' consent to suit by the United States is limited to suits commenced and prosecuted under the discretion and control of responsible executive branch officials. The exercise of such discretion and authority cannot be delegated or assigned: "Suits brought by the United States itself require the exercise of political responsibility for *each* suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999) (emphasis added).

The FCA, to the extent that it imposes liability on the States, allows a private person to commence and prosecute a suit against a State. The private person's commencement and prosecution of such litigation does not involve the United States' discretion and control. To the contrary, pursuit of this matter stems from plaintiff Stevens' exercise of rights granted to private persons by the FCA. Thus, this suit violates the Eleventh Amendment because it is not subject to the United States' direct responsibility and control.

ARGUMENT

Jonathan Stevens is a private individual, not subject to the executive branch's control, who seeks to exercise the United States' sovereign authority to sue a State free from Eleventh Amendment limitations. As this Court recognized last Term, the States in the plan of convention reserved their sovereign immunity to suits by private persons and consented only to suit by other States and the Federal Government. *See Alden*, 119 S. Ct. at 2267. Such suits, of course, must be of sufficient importance to require the United States to take action against another sovereign. *See id.* The decision that an issue has risen to such importance rests exclusively with politically responsible executive branch officers. *See Blatchford v. Native Village*, 501 U.S. 775, 785 (1991). There can be no question that a suit against a State brought solely at a private person's behest is not a suit by the United States.

However, the Court need not address the issue of whether the United States may delegate to private persons its sovereign authority to sue a State. In light of the States' role in the plan of convention, Congress must be unusually explicit if it really intends to authorize suit against States under the FCA. The FCA contains no such explicit statements. Indeed, Congress never contemplated, much less intended, to permit suits by private persons against States under the False Claims Act.

I. A STATE IS NOT A "PERSON" SUBJECT TO LIABILITY UNDER 31 U.S.C. § 3729(a) OF THE FALSE CLAIMS ACT.

In 1863, in the midst of the Civil War, Congress faced growing frustration with "the massive frauds perpetrated by large contractors." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). Anxious to stop this plundering of the

Nation's treasury, Congress enacted the statute now known as the False Claims Act. *See An Act to prevent and punish Frauds upon the Government of the United States*, ch. 67, 12 Stat. 696 (1863). The Act authorized *qui tam* suits – suits prosecuted by private individuals on behalf of themselves and the United States – as a device for recovering monies of which the Federal Government had been defrauded. Members of Congress saw some advantage in permitting private individuals "acting . . . under the strong stimulus of personal ill will or the hope of gain," *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (internal quotation marks omitted), to pursue actions against persons alleged to have defrauded the government. Authorizing *qui tam* actions allowed Congress to harness the potential greed of private citizens in pursuit of those guilty of fraud. *See id.* (*qui tam* actions are one of the least expensive and most effective devices for preventing frauds on government).

The court of appeals examined the FCA against this background and nonetheless concluded that Congress intended to impose liability on States under the Act. This interpretation of the FCA defies common sense. The 1863 Congress had no intention of enacting a statute that subjected the States to suits by private individuals and informers – persons motivated primarily by greed and not by an interest in the public good. That particular Congress, well aware of the burdens and costs of the Civil War on the States of the Union, would not have subjected the States to liability for double damages and substantial fines. Indeed, there is not a shred of evidence, in either the language of the Act or in its legislative history, that suggests that Congress even contemplated such a result. Congress merely enacted a statute that

imposed liability on "person[s]." In other words, Congress described those subject to liability under the Act with a term that ordinarily *does not* include the States. See, e.g., *Will*, 491 U.S. at 64.

The holding of the court of appeals, that States are "persons" subject to liability under the FCA, is inconsistent with the FCA's plain language, the clear statement rule, the doctrine of constitutional doubt, and with the FCA's context and purpose. It should not stand.

A. THE FALSE CLAIMS ACT'S PLAIN LANGUAGE EXCLUDES STATES.

As this Court recently reaffirmed, analysis of an issue of statutory construction "begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 760 (1999) (citation omitted) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). Here, the relevant statutory language is straightforward: the FCA provides only that "any person who" commits certain fraudulent acts against the United States is liable for civil penalties, treble damages, fees, and costs. 31 U.S.C. § 3729(a). Although the term "person" as used in § 3729(a) is not defined in the Act, this Court has repeatedly held that "'in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.'" *Will*, 491 U.S. at 64 (quoting *Wilson*, 442 U.S. at 667 (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941))); see also *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (where term is not defined in statute, Court construes term in accordance with its ordinary or natural meaning). Thus, the statutory language provides a clear

answer to this issue of statutory construction: States are not "persons" liable under the FCA.

This Court's holdings in *Will* and *Wilson* are particularly relevant to the interpretation of the FCA. See *Will*, 491 U.S. at 64 (State is not a "person" subject to liability under the Civil Rights Act of 1871, 42 U.S.C. § 1983); *Wilson*, 442 U.S. at 667 (State is not a "white person" for purposes of 25 U.S.C. § 194, which shifts burden of proof in property rights case between Indian and "white person"). Like the FCA, the statutes at issue in *Will* and *Wilson* were first enacted in the nineteenth-century; indeed, the Civil Rights Act of 1871, at issue in *Will*, was enacted just eight years after the FCA. See *Smith v. Wade*, 461 U.S. 30, 85 (1983) (Rehnquist, J., dissenting) (as FCA and § 1983 are "roughly contemporaneous," express provision for double damages and civil forfeiture penalty under FCA indicates that Congress did not intend to permit punitive damages under § 1983). And, in both *Will* and *Wilson*, the Court recognized that following the common usage of the term "person" is particularly appropriate in interpreting a statute that imposes a burden or a liability. See *Will*, 491 U.S. at 64 (following common usage of "person" as excluding sovereign is "particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before"); *Wilson*, 442 U.S. at 667 (ordinary rule that "person" does not include sovereign is "[p]articularly . . . true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage").

In light of the Court's holdings in *Will* and *Wilson*, the Court's analysis of this provision of the FCA should begin, and end, with the language of the statute. As applied to the States, the meaning of the term "person" in § 3729(a) of the FCA is clear and unambiguous. States are

not "persons" and therefore they are not subject to liability under the Act.

B. THE CLEAR STATEMENT RULE AND THE DOCTRINE OF CONSTITUTIONAL DOUBT COMPEL THE CONCLUSION THAT STATES ARE NOT PERSONS SUBJECT TO FALSE CLAIMS ACT LIABILITY.

1. If this Court is to look further than § 3729(a)'s plain language, the FCA must nonetheless be construed in light of this Court's "clear statement" jurisprudence. The clear statement rule requires Congress to make its intention "to alter the 'usual constitutional balance between the States and the Federal Government' . . . 'unmistakably clear in the language of the statute.'" *Will*, 491 U.S. at 65 (emphasis added) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). The Court has described the clear statement rule as "nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). To that end, the Court has traditionally applied the clear statement rule to construe federal statutes that potentially impose financial liability on States, subject States to suit by private parties, or otherwise intrude on state sovereignty. *See, e.g., id.* at 467 (declining to interpret Age Discrimination in Employment Act to apply to state court judges, absent clear statement from Congress that it intended such a result); *Will*, 491 U.S. at 65 (declining to hold that States are "persons" subject to liability under 42 U.S.C. § 1983, absent clear statement of Congressional intent); *Atascadero*, 473 U.S. at 246 (declining to interpret Rehabilitation Act as overriding state sovereign immunity,

absent unequivocal statutory language showing that Congress specifically chose to subject States to federal jurisdiction); *Pennhurst State Sch. & Hosp. v. Halderman* ("Pennhurst I"), 451 U.S. 1, 24-25 (1981) (declining to interpret federal statute as imposing affirmative obligations on States where Congress did not clearly express its intent to impose conditions on grant of federal funds to States); *United States v. Bass*, 404 U.S. 336, 349-50 (1971) (absent clear statement from Congress, Court will not assume that Congress intended to change significantly sensitive relationship between federal and state criminal jurisdiction).

There can be no question that imposing liability on the States under the FCA would alter the "usual constitutional balance" between the States and the Federal Government. The Act bears several of the characteristics that have elsewhere prompted this Court to apply the clear statement rule. First, the Act would subject the States to suits commenced and prosecuted by private individuals, calling into question the protections of the Eleventh Amendment. As argued in Part II, *infra*, a *qui tam* suit by a private individual against a State under the FCA violates state sovereign immunity. "[P]rinciples of federalism," however, "require [the Court] always to apply the clear statement rule before . . . consider[ing] the constitutional question." *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.15 (1996). Typically, then, this Court first asks whether Congress "'unequivocally expressed its intent to abrogate the immunity'" in a particular statute, and only then considers whether Congress "acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). The FCA's "'general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.'" *Id.* at 56 (quoting *Atascadero*, 473 U.S. at

246). Moreover, authorizing private persons rather than responsible federal officials to sue States on behalf of the United States strikes directly at the balance of federal/state power struck in the plan of convention, altering the "usual constitutional balance" between the Federal Government and the States. See *Hilton v. South Carolina Public Rys. Comm'n*, 502 U.S. 197, 209 (1991) (O'Connor, J., dissenting) (clear statement rule protects balance of power between States and Federal Government as established in Constitution).

Second, the Act would place States at risk for substantial financial liability, including costs of defense and the punitive sanctions of civil penalties and treble damages – yet nowhere in the Act did Congress indicate that it intended to impose such unprecedented financial liability on the States. As the States routinely rely on federal funds to administer and enforce a wide range of necessary government programs, the potential cost to the States to litigate and defend suits under the Act cannot be overstated.⁴ This Court should adhere to its reasoning in

⁴ This is not an idle concern; in recent years, the number of *qui tam* cases brought against States has mushroomed. See, e.g., *United States ex rel. Long v. SCS Business & Tech. Inst., Inc.*, 173 F.3d 870, *supp. op.*, 173 F.3d 890 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3116 (U.S. Aug. 2, 1999); *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (5th Cir. 1999); *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870 (8th Cir. 1998); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2387 (1999); *United States ex rel. Milam v. University of Texas*, 961 F.2d 46 (4th Cir. 1992). Regardless of the merit of the underlying allegations, such cases – which probe the most arcane details of complicated federal-state programs – impose substantial defense costs on the States. Cf. *United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1458-59, 1462 (4th Cir. 1997) (after

Pennhurst I, and "assume that Congress w[ould] not implicitly attempt to impose massive financial obligations on the States." 451 U.S. at 17.

Third, suits against States under the FCA impede the States' exercise of essential police power functions. The FCA's *qui tam* provisions permit private individuals – individuals motivated by nothing more than greed or perhaps ill will – to target and disrupt a State's core governmental functions. See *Hughes*, 520 U.S. at 949 (*qui tam* relators "are motivated primarily by prospects of monetary reward rather than the public good"). Whether a State expends its resources and funds to defend a suit, or settles a suit to avoid the risk of even greater liability, the State is forced to shift its limited resources away from essential programs intended to protect and benefit the general public. Cf. *Alden*, 119 S. Ct. at 2264 (private suits for money damages against nonconsenting States "may threaten financial integrity of States," creating "staggering burdens" and posing "a severe and notorious danger to the States and their resources").

In light of the concerns underlying this Court's "clear statement" rule, Congress's use of the undefined term "person" in § 3729(a) is plainly insufficient to provide evidence of Congressional intent to impose liability on the States under the FCA. See *Will*, 491 U.S. at 65 (Congress's use of undefined term "person" in § 1983 "falls far short of satisfying" the clear statement rule); *Atascadero*, 473 U.S. at 246 (statutory provision authorizing suits against "any recipient of federal assistance" insufficient to authorize suit against State in federal court).

lengthy litigation, reversing trial court's decision in favor of relator on ground that relator failed to show that statements at issue were either false or material).

The court of appeals nonetheless unpersuasively reasoned that the FCA does not alter the usual constitutional balance of federal and state powers because the goal of the FCA "is simply to remedy and deter . . . fraud" and the "States have no authority, traditional or otherwise, to engage in such conduct." Pet. App. 21. This narrow view of both the FCA and the States' sovereign interests is at odds with this Court's precedents. In applying the clear statement rule to § 1983 in *Will*, and the Age Discrimination in Employment Act in *Gregory*, the Court did not ask whether the States traditionally had authority to deprive citizens of their civil liberties or to discriminate against the elderly. Instead, the Court looked more broadly at whether applying those statutes to the States was consistent with the role of the States in our federal system. See *Gregory*, 501 U.S. at 460 (Congressional interference with decision of people of Missouri to define their constitutional officers would upset usual constitutional balance of federal and state powers); *Will*, 491 U.S. at 65 (applying clear statement rule to § 1983). As discussed above, permitting suits against States under the FCA would have a substantial impact on State authority. Accordingly, the court of appeals erred in not applying the clear statement rule.

2. Similarly, the court of appeals erred in not applying the "doctrine of constitutional doubt" in deciding whether States are "person" defendants under the FCA. The doctrine has force "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. at 408; accord *Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998). In such circumstances, a "statute must be

construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

Applying the doctrine of constitutional doubt eliminates any doubt that the FCA could reasonably be construed to impose liability on States. Adopting an interpretation of "person" that includes the States raises what is unquestionably a "grave and doubtful constitutional question": namely, whether suits under the Act commenced and prosecuted by private individuals against unconsenting States violate the States' Eleventh Amendment immunity. This question has led to a profound split of authority among the courts of appeals. Compare Pet. App. 18 (*qui tam* suits are in essence suits by United States and hence not barred by Eleventh Amendment) with *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 294 (D.C. Cir. 1999) (where United States has not actively intervened in action, Eleventh Amendment bars *qui tam* plaintiffs from instituting suits against sovereign States in federal court) and *United States ex rel. Long v. SCS Business & Tech. Inst., Inc.*, 173 F.3d 870, 886 (D.C. Cir. 1999) (indicating "profound doubts" that Eleventh Amendment permits *qui tam* suit against State). As the term "person" used in § 3729(a) does not ordinarily include the States, this Court need not and should not entertain a contrary interpretation that raises such a fundamental constitutional issue.

C. THE FALSE CLAIMS ACT'S PURPOSE AND CONTEXT ARE ENTIRELY CONSISTENT WITH THE PLAIN MEANING OF "PERSON."

It is instructive that the overall purpose and context of the FCA fully support the plain, ordinary meaning of the term "person" as excluding the sovereign States. *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (words of statute should be read in their context and with view to their place in overall statutory scheme).

1. The Act was first passed in 1863, as "An Act to prevent and punish Frauds upon the Government of the United States." Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. Nothing in the language of the original Act or in its legislative history suggests that Congress in 1863 intended or even contemplated that States would be subject to suit under the Act. The language chosen by the 1863 Congress, which imposed liability for false claims on "any person in the land or naval forces of the United States," and on "any person not in the military or naval forces," *id.* §§ 1, 3, is plainly inconsistent with an intent to include States – which cannot engage in military service – as potential defendants. In fact, as this Court has recognized, the Act's purpose was to stop "the massive frauds perpetrated by large contractors during the Civil War." *Bornstein*, 423 U.S. at 309 (emphasis added); *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547, 551-52 (1943). Contemporary statements by members of Congress indicate this widespread concern with fraud by private defense contractors. *See, e.g., Cong. Globe*, 37th Cong., 3d Sess. 952 (1863) (statement of Senator Howard, describing numerous complaints of fraud and corruption by "persons who are contractors, or who are employed to contract for ships, vessels, steamers, watercraft, ordnance, arms, munitions of war").

Other provisions of the original Act are similarly inconsistent with an intent to impose liability on States. The Act provided for civil penalties, including double damages and fines, as well as possible criminal imprisonment for up to five years. Act of Mar. 2, 1863, § 3, 12 Stat. 696, 698. Obviously, a term of imprisonment may not be imposed on a State. Nor is it at all likely that Congress, in the midst of the Civil War, sought to burden the States fighting the war for the Union with liability for double damages and civil penalties. In short, there is simply no evidence that the 1863 Congress envisioned that the Act applied to the States.

2. The relevant language of the FCA remained virtually unchanged until the 1986 amendments.⁵ At that time, § 3729(a) was changed slightly to apply to "[a]ny person," and the exception for actions involving persons in the armed forces was moved to a different section. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153 (1986), *codified at* 31 U.S.C. §§ 3729(a), 3730(e). Although the 1986 amendments made substantive changes to other provisions of the FCA, the term "person" in § 3729(a) was retained and its meaning

⁵ In 1943, the FCA was amended to reduce the relator's share of the recovered proceeds and to require relators to contribute new information previously unknown to the government in order to bring suit. Act of Dec. 23, 1943, Pub. L. No. 213, 57 Stat. 608. The statute continued to impose liability on "[a]ny person not in the military." A 1982 amendment reorganized the statute but did not make any substantive changes; the liability section of the statute was rewritten slightly to apply to a "person not a member of the armed forces of the United States." Act of Sept. 13, 1982, Pub. L. 97-258, 96 Stat. 877, 978; *see also* H.R. Rep. No. 651, 97th Cong., 2d Sess. 1, 3, 143 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1897, 2037.

was not changed. See S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5267 ("1986 Senate Report") (discussing purposes of proposed amendments to FCA).

Moreover, as with the original Act, other provisions of the 1986 amendments are inconsistent with including States as defendants under the FCA. The 1986 Congress added 31 U.S.C. § 3733, which authorizes the Attorney General to issue a civil investigative demand to "any person" with information relevant to a false claims investigation. Solely for purposes of this new section, Congress specifically defined "person" to include "any State or political subdivision of a State." 31 U.S.C. § 3733(l)(4). If the term "person" as used in the FCA already included the States, this added definition would have been unnecessary. The decision to include this definition of "person" in § 3733 plainly shows that Congress used express language where it intended the term "person" in the FCA to include the States. See, e.g., *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (where Congress includes particular language in one section of statute but omits it in another section of same statute, Court generally presumes that Congress acted intentionally and purposely in so doing).

The 1986 amendments also substantially increased the punitive nature of the FCA by changing the provision for double damages to treble damages and increasing the civil penalty from two thousand dollars to between five and ten thousand dollars.⁶ Treble damages are inherently

⁶ A report from the Congressional Budget Office, included as part of the legislative history of the 1986 amendments, noted that the proposed amendments increased the penalties and damages under the Act, but concluded that the amendments

punitive in nature.⁷ See, e.g., *American Soc'y of Mechanical Eng'g, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 574 (1982) (treble damages serve both punitive and deterrent purposes); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct. . . ."). Imposing such punitive sanctions on States would be unprecedented. In fact, just a few years before

would "involve no significant costs to the federal government or to state or local governments." 1986 Senate Report at 37, 1986 U.S.C.C.A.N. at 5302 (Letter from Rudolph G. Penner, Director, Congressional Budget Office, to Senator Strom Thurmond, Chairman, Committee on the Judiciary, June 12, 1986). If States were thought to be potential defendants under the Act, the conclusion reached by the Congressional Budget Office would be grossly inaccurate.

⁷ In *Hess*, the Court concluded that a *qui tam* action under the FCA does not violate double jeopardy where the defendant was previously subject to a criminal prosecution for the same conduct. 317 U.S. at 549. The Court declined to characterize the double damages provision of the original Act as punitive or criminal in nature, noting that "requiring payment of a lump sum and double damages will do no more than afford the government complete indemnity for the injuries done it." *Id.* The court of appeals in the present case relied on *Hess* to conclude that the present Act's treble damages provision is remedial, and not inconsistent with imposing liability on States. Pet. App. 29-30. This analysis is mistaken, for two reasons. First, the issue in *Hess* was whether the *qui tam* action was "punishment" for purposes of the double jeopardy clause, not whether States should be subjected to exemplary or punitive damages. *Hess*, at 548-49. The Court in *Hess* itself recognized that Congress could impose punitive damages as a civil remedy without running afoul of the double jeopardy clause. *Id.* at 550. Second, the present Act provides for treble damages as well as penalties, costs and fees; thus, it is no longer true that the Act does no more than make the government whole for its loss.

these amendments passed, this Court ruled that the 1871 Congress did not authorize awards of punitive damages against municipalities under 42 U.S.C. § 1983: "Damages awarded for punitive purposes . . . are not sensibly assessed against the governmental entity itself." *City of Newport*, 453 U.S. at 267 (1981). As the Court explained in *City of Newport*, imposing punitive awards on governmental entities places an unjustified burden on innocent taxpayers while doing little to deter future misconduct. *Id.* at 267-69. Particularly in light of this Court's decision in *City of Newport*, the punitive sanctions authorized by the 1986 amendments cannot be reconciled with an interpretation of § 3729(a) that includes States as potential defendants.

D. THE COURT OF APPEALS ERRED IN CONCLUDING THAT STATES ARE SUBJECT TO FALSE CLAIMS ACT LIABILITY.

In reaching its conclusion in this case, the court of appeals ignored the plain language of § 3729(a) of the FCA, declined to follow accepted rules of statutory construction and misconstrued the Act's purpose and context. Instead, the court of appeals determined that States are "person" defendants under the FCA based on: (1) the "consistent meaning" canon of statutory construction, (2) so-called legislative history pertaining to the Act, and (3) the Act's overall purpose of deterring fraud. In each case, the court of appeals was mistaken.

1. The court of appeals invoked the "consistent meaning" canon after looking to the use of the term "person" in 31 U.S.C. § 3730(b)(1), which provides that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States

Government." The court of appeals assumed that, because States are "person[s]" who may bring *qui tam* actions under § 3730(b)(1), States also must be "person" defendants under § 3729(a). See Pet. App. 23-24. This assumption is unfounded. Although the court of appeals "th[ought] it plain that the States are person[s] within the meaning of § 3730(b)(1)," *id.* at 23, in fact, to Vermont's knowledge, no court has held that a State is a "person" authorized to bring a *qui tam* action under the FCA.⁸ That some States have acted as *qui tam* relators – and their authority to do so was apparently not challenged – is hardly conclusive as a matter of statutory interpretation. As the meaning of the term "person" as applied to *qui tam* plaintiffs is far from clear, the consistent meaning canon is simply irrelevant here.

Moreover, application of the consistent meaning canon to the uses of the term "person" in the FCA ignores the critical difference between authorizing a State to act as a *plaintiff* in some circumstances and imposing liability on a State as a *defendant*. States are sovereign entities, exercising authority jointly with the federal government as part of our federalist system. As this Court recently reaffirmed, "[t]he constitutional role of the States sets them apart from other . . . defendants." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2231 (1999) (quoting *Welch v. Texas Dep't of Highways*, 483 U.S. 468, 477 (1987)); cf. *Will*, 491 U.S. at 64

⁸ Vermont is aware of three published decisions in which a State brought a *qui tam* suit under the FCA. See *United States ex rel. Woodard v. Country View Care Center, Inc.*, 797 F.2d 888 (10th Cir. 1986); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *United States ex rel. Hartigan v. Palumbo Bros.*, 797 F. Supp. 624 (N.D. Ill. 1992). None of these decisions address the issue of whether a State is a "person" plaintiff under the Act.

(following rule that statutes employing term "person" are ordinarily interpreted to exclude the sovereign is particularly appropriate where statute purports to impose liability on States). Thus, the question of whether a State may be a plaintiff under the FCA is a wholly different inquiry than the question of whether a State can be a defendant under the Act. The consistent meaning canon has no force under such circumstances. *See, e.g., Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (presumption that term has same meaning in different parts of statute is "not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent"). The court of appeals therefore erred in relying on the consistent meaning canon to hold that a State may be a person defendant under the FCA.

2. The court of appeals relied on certain legislative reports that it erroneously characterized as legislative history. First, the court of appeals found persuasive evidence of Congressional intent in a Congressional report from 1862 that discussed instances of fraud on the part of state officials in connection with government contracts. *See* Pet. App. 25 (citing *Government Contracts*, H.R. Rep. No. 37-2, pt. II-a (1862)). This report was not prepared in connection with any proposed false-claims legislation and contains no reference to such legislation. Furthermore, while the report addresses instances of fraud by state officials, it does not suggest that Congress intended to impose liability on the States themselves. *Cf. Will*, 491 U.S. at 68 (although Congress intended to provide remedy under § 1983 for unconstitutional state action, Congress did not intend to include States themselves as

persons subject to liability). Contrary to the reasoning of the court of appeals, the 1862 report thus provides no indication that Congress intended to authorize *qui tam* suits against the States under a statute passed the following year.

The court of appeals also devoted substantial attention to the background statement of a Senate Committee report prepared in connection with the 1986 amendments to the FCA, *see* Pet. App. 11, 22-23, 25, 27-28, despite the fact that the 1986 amendments did not alter, amend or in any way change the meaning of the term "person" in § 3729(a). *See* 1986 Senate Report at 2, reprinted in 1986 U.S.C.C.A.N. at 5266-67 (discussing purposes of proposed amendments to FCA). This so-called "Background Statement" discussed the history of the FCA and past court interpretations of the Act. *See id.* at 8-13, 1986 U.S.C.C.A.N. at 5273-78. It suggests that the term "person" as used in the FCA included the States: "The False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations – as well as States and political subdivisions thereof." *Id.* at 8, 1986 U.S.C.C.A.N. at 5273 (citations omitted). This statement is supported by reference to three decisions of this Court, none of which in fact addressed the definition of "person" in the FCA. *Id.* (citing *Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *Georgia v. Evans*, 316 U.S. 159, 161 (1942); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978)).

This "Background Statement" is inaccurate and, in any event, entitled to no weight with respect to the meaning of the term "person" in the FCA. The Background Statement is not an explanation of Congress's intent in passing the 1986 amendments to the Act. It is simply an attempt by committee members of a later Congress to

expound on the meaning of a statute passed by another Congress some 123 years earlier. As this Court has often warned, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

Indeed, this Court has repeatedly rejected attempts to discern the views of an earlier Congress by relying on the opinions and observations of a later Congress. *See, e.g., NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 582 (1994) (isolated statement in 1974 committee report did not provide authoritative interpretation of portion of National Labor Relations Act enacted in 1947); *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988) (House report pertaining to 1985 reenactment of Equal Access to Justice Act did not provide authoritative interpretation of statute as originally enacted in 1980); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (legislative observations in Senate Report written eleven years after Age Discrimination in Employment Act was passed were in no sense part of legislative history of Act). The Court's reasoning in *Pierce* is particularly relevant here. In *Pierce*, the Court considered the meaning of the phrase "substantially justified" in the Equal Access to Justice Act (EAJA). The EAJA was originally enacted in 1980, and reenacted with the same language in 1985. *Pierce*, 487 U.S. at 566-67. The Court acknowledged that a House Report prepared in connection with the 1985 reenactment approved the holdings of several courts that "substantially justified" was a higher standard than mere reasonableness. *See id.* at 566. The Court declined to give force to the interpretation endorsed by the House Report, however:

If this language [in the House Report] is to be controlling upon us, it must be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter – because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation.

487 U.S. at 566-67.

Here, the 1986 Senate Report pertaining to the amendments to the FCA suffers from the same limitations as the House Report at issue in *Pierce*. There is no suggestion in the text of the 1986 amendments or in the legislative history that Congress thought it was changing the meaning of the term "person" in the Act. Rather, the 1986 Senate Report accepts the meaning of the term "person" as originally enacted. A mistake made by the drafter of the 1986 Senate Report in describing the meaning of the term "person" is not sufficient to expand the meaning of the term as enacted in 1863.

In any event, the Report is simply inaccurate. At the time it was written, no court had held that a State could properly be named as a defendant "person" under the Act. In fact, the only court known to have addressed the issue held that States could *not* be sued under the FCA.

See *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980) (describing district court's ruling that defendant State was not "person" subject to liability under FCA; vacating and remanding decision on other jurisdictional grounds). As noted, the cases cited in the Report did not address the meaning of the word "person" in the FCA. See *Ohio v. Helvering*, 292 U.S. at 370-71 (word "person" in statute dealing with liquor dealers included States); *Georgia v. Evans*, 316 U.S. at 162-63 (State is "person" who can be plaintiff in Sherman Act suit); *Monell v. Department of Social Svs.*, 436 U.S. at 690 (local governments not immune from suit under 42 U.S.C. § 1983). In sum, the Report provides no basis for interpreting "person" in the FCA to include States.

3. Finally, the court of appeals justified its interpretation of the term "person" by looking to the Act's broad and remedial purpose to remedy and deter fraud against the federal government. The court of appeals characterized the provisions of the Act as "all-encompassing" and concluded that there was "no indication that Congress meant to carve out any safe haven for frauds perpetrated by the States." Pet. App. 26. This is, however, plainly the wrong inquiry. Regardless of the remedial nature of a statute, imposing liability on States is a far different matter than imposing liability on other classes of defendants. Cf. *College Sav. Bank*, 119 S. Ct. at 2231 (recognizing that constitutional role of States sets them apart from other defendants). The fact that Congress did not expressly reject applying the FCA to the States is beside the point. What is relevant here is that Congress did not affirmatively provide for suits against States. Absent such express statutory language, Congress should not be presumed to have taken the extraordinary step of imposing liability on the States under the FCA.

* * *

The term "person" in § 3729(a) of the False Claims Act cannot reasonably be construed to include the sovereign States. The plain language of the statute is to the contrary; the purpose and context of the False Claims Act are inconsistent with imposing liability on the States; Congress's use of the term "person" is entirely inadequate to meet the requirements of the clear statement rule; and the contrary interpretation raises grave doubts as to the constitutionality of the statute. Indeed, the contrary interpretation – the interpretation adopted by the court of appeals – finds no support in this Court's precedents or in any recognized rule of statutory construction. This Court should reverse the decision of the court of appeals, and hold that States are not "persons" subject to liability under § 3729(a) of the False Claims Act.

II. THE ELEVENTH AMENDMENT BARS PRIVATE PERSONS FROM COMMENCING AND PROSECUTING FALSE CLAIMS ACT SUITS AGAINST STATES.

The Eleventh Amendment provides that the "Judicial Power of the United States shall not . . . extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State" These words, however, do not establish or limit the States' immunity from suit. Rather, the Eleventh Amendment has long been understood " 'to stand not so much for what it says, but for the presupposition . . . which it confirms.' " *Seminole*, 517 U.S. at 54 (1996) (quoting *Blatchford*, 501 U.S. at 779). This presupposition is that: (1) each State in our federalist system is a sovereign entity, and (2) "that ' "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual

without its consent." ' ' *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (quoting The Federalist No. 81, p. 487 (A. Hamilton) (C. Rossiter ed. 1961))). Accordingly, Congress, pursuant to its Article I powers, cannot authorize private parties to sue a State. *Id.* at 72-73; see also *Alden*, 119 S. Ct. at 2266.

It is undisputed that the State of Vermont and its Agency of Natural Resources are protected by the Eleventh Amendment. See *Pennhurst State Sch. & Hosp. v. Halderman* ("Pennhurst II"), 465 U.S. 89, 100 (1984) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment."). Nor is it disputed that Vermont has not consented to be sued in federal court by a private citizen. See Vt. Stat. Ann. tit. 12, § 5601(g) ("Nothing in [Vermont's partial waiver of sovereign immunity] waives the rights of the state under the Eleventh Amendment of the United States Constitution."). Finally, there is no question that this matter was commenced and is being prosecuted by a private person. On its face, therefore, plaintiff Stevens' lawsuit violates the Eleventh Amendment.

In order to avoid this straightforward conclusion, the court of appeals deemed Stevens' lawsuit to be "in essence a suit by the United States" brought pursuant to its sovereign exemption from Eleventh Amendment limitations. Pet. App. 18. What is really at issue, therefore, is whether the Congress, by the simple expedient of the *qui tam* device, can sidestep its inability to authorize private parties to sue States and "strip the States of their immunity from private suits." *Alden*, 119 S. Ct. at 2264. Put another way, may the balance struck in the plan of convention be altered through the subterfuge of a *qui tam* action? The answer is "no" because such a result is flatly

contrary to this Court's decisions in *Blatchford* and *Alden*, and is inconsistent with the concept of federalism established in the plan of convention.

A. A SUIT AGAINST A STATE BY A PRIVATE PERSON NOMINALLY ON BEHALF OF THE UNITED STATES VIOLATES THE ELEVENTH AMENDMENT.

As the Court recognized last Term, the Constitution "reserves" to the States "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 119 S. Ct. at 2247. An essential attribute of the sovereignty reserved to the States is that States are immune from suit " 'save where there has been "a surrender of this immunity in the plan of convention." ' ' *Id.* at 2254 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934) (quoting The Federalist No. 81, at 487)).

The States of course, through the plan of convention, consented to suit by other States or by the Federal Government. *Alden*, 119 S. Ct. at 2267; *Principality of Monaco*, 292 U.S. at 328-29; *United States v. Texas*, 143 U.S. 621, 644-46 (1892). However, the fact that the United States purported to delegate or assign its rights to Stevens does not convert this case into a suit brought by the United States that can override Vermont's sovereign immunity. See *Blatchford*, 501 U.S. at 785. In *Blatchford*, Alaska Native villages brought an action against an Alaska state official. Alaska claimed Eleventh Amendment immunity from suit, and in response, the Native Villages argued that Congress delegated to the Tribes the United States' authority to sue a State. The Court in *Blatchford* stated:

We doubt, to begin with, that that sovereign exemption *can* be delegated – even if one limits

the permissibility of delegation (as respondents propose) to persons on whose behalf the United States itself might sue. The consent, "inherent in the convention," to suit by the United States – at the instance and under the control of responsible federal officers – is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself.

Id.

The rule that only the United States itself can exercise its power to sue a sovereign State was reaffirmed in *Alden*. The *Alden* Court recognized that the States' consent to suits by the United States was meant to provide an "alternative to extralegal measures." *Alden*, 119 S. Ct. at 2267. However, the consent to suit in lieu of extralegal measures was not understood as diminishing the gravity of a sovereign pursuing a fellow sovereign. There are strong countervailing pressures on States and the Federal Government not to prosecute a suit against a fellow sovereign. The decision to sue "require[s] the exercise of political responsibility," which is a significant protection that each partner to the plan of convention relies upon to ensure against litigation over mere trifles. *Id.* But this political control "is absent from a broad delegation to private persons to sue nonconsenting States." *Id.*

For this reason, this Court in *Alden* specifically defined the circumstances in which a State's immunity from suit must give way to claims by the United States, viz., "[a] suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed.'" *Alden*, 119 S. Ct. at 2267

(quoting U.S. Const., art. II, § 3) (emphasis added). Whatever else can be said about the relator in this case, it cannot seriously be contended that he is invested with any "constitutional dut[ies]."

Moreover, any claim that the United States may delegate its sovereign exemption from Eleventh Amendment limitations is nothing more than an attempted "end run" around the Eleventh Amendment. Cf. *Green*, 474 U.S. at 73. Congress cannot use its Article I powers to abrogate the States' sovereign immunity and impose liability on the States. *Alden*, 119 S. Ct. at 2266; *Seminole*, 517 U.S. at 72-73. Yet, if delegation of the United States' sovereign authority to sue a State is permissible, Congress could achieve the same result through use of the *qui tam* device. It could create private causes of action against the States in the name of the United States without constitutional impediment. For example, persons claiming violations of the Fair Labor Standards Act or Native American Tribes in disagreement with a State would become self-appointed deputies and pursue causes of action nominally on behalf of the United States.

Alden and *Seminole* cannot be eviscerated by mere use of the *qui tam* device. The exercise of the United States' sovereign exemption from Eleventh Amendment restrictions requires more than the mere name of the United States. Responsible executive branch officers must exercise discretion, and be responsible for and in control of commencement and prosecution of suit against a State on behalf of the United States. Otherwise, the lawsuit is constitutionally barred.

B. THE BLATCHFORD/ALDEN RULE IS CRITICAL TO MAINTAINING THE FEDERAL-STATE RELATIONSHIP ESTABLISHED THROUGH THE CONSTITUTIONAL PLAN.

The rule prohibiting delegation of the United States' sovereign authority to private parties is supported not only by this Court's prior decisions, but also by sound policies imbedded in the Constitutional plan. The Constitution establishes a "structure of joint sovereigns," and a "'mandated balance of power' between the States and the Federal Government." *Gregory*, 501 U.S. at 458 (quoting *Atascadero*, 473 U.S. at 242). Through this balance, the States and the Federal Government "'exercise concurrent authority.'" *Alden*, 119 S. Ct. at 2247 (quoting *Printz v. United States*, 521 U.S. 898, 919-920 (1997)).

Maintaining the balance established by this structure of joint sovereigns requires that sovereigns responsibly exercise discretion. This is particularly true when the United States contemplates suit against a State.

The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of Convention, the States have consented to suits of the first kind but not of the second.

Id. at 2269. Here, as in *Alden*, "despite specific statutory authorization" that would have allowed the United States to prosecute this case – a case supposedly brought on behalf of the United States and baldly charging that Vermont deceitfully mismanaged its relations with the Federal Government – the United States apparently found

the relator's allegations "insufficient to justify sending even a single attorney to [Vermont] to prosecute this litigation." *Id.*

The United States' abdication is no small matter to Vermont. Indeed, this lawsuit requires the obvious to be stated: lawsuits, and in particular suits claiming fraud or other forms of deceit, turn a cooperative relationship into an adversarial one. Giving a private person the power to police Vermont's relationship with the United States disrupts the federal-state relationship and impedes Vermont's exercise of its police powers.

1. This disruption of federal-state relations is apparent on at least three different levels. First, it affects the working relationship between federal and state agencies. Vermont's Agency of Natural Resources works hand-in-hand with EPA to assure compliance with the Clean Water and Safe Drinking Water Acts. The Court has termed this rapport "'a program of cooperative federalism.'" *New York v. United States*, 505 U.S. 144, 167 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 289 (1981)). Indeed, the Court in *New York v. United States* cited the States' role under the Clean Water Act – one of the programs at issue here – as a prime example of "cooperative federalism." *Id.* at 167 ("Clean Water Act 'anticipates a partnership between the States and the Federal Government, animated by a shared objective.'" (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992))).

EPA normally provides the States with substantial flexibility to administer these programs. Such flexibility is essential to best adapting national programs to local conditions and interests. Corresponding to the flexibility accorded the States by EPA is a full range of remedies

available to EPA in the event that a State does not correctly administer these programs. For example, the EPA may: request all financial and programmatic records and supporting documents, 40 C.F.R. § 31.42 (1998); require performance reviews, *id.* §§ 31.40, 31.41; temporarily withhold cash payments pending correction of any non-compliance, *id.* § 31.43(a)(1); disallow all or part of the cost of the program, *id.* § 31.43(a)(2); wholly or partly suspend, terminate or annul the award, *id.* § 31.43(a)(3); withhold further awards, *id.* § 31.43(a)(4); and seek reimbursement of funds. *Id.* § 31.51. The EPA may also disapprove and take over administration of State programs. 42 U.S.C. § 300h-7(c), (i)(4); 33 U.S.C. § 1329(d), (h)(8)-(11).

As recognized by Judge Weinstein, below, "[u]se of extreme measures by the federal bureaucracy to penalize a state is infrequent because of the realities of politics, and the need to avoid disaffection with federal officials." Pet. App. 80.

"The federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the process. Not necessarily an equal voice: because federal law is supreme and Congress holds the purse strings, the federal government is bound to prevail if push comes to shove. But federal dependency on state administrators gives federal officials an incentive to see that push doesn't come to shove, or at least that this happens as seldom as possible, and that means taking state interests into account."

Id. at 81-82 (quoting Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1544 (1994)).

Here, the private *qui tam* plaintiff, by his unfettered choice, seeks to impose the harshest of available remedies upon the State of Vermont – liability for fraud carrying

treble damages and civil penalties. Vermont cannot remedy this situation by working with its federal partner because a private *qui tam* plaintiff has unilaterally decided that "push has come to shove." This represents a total breakdown of cooperative federalism.

Second, the private *qui tam* plaintiff's prosecution of this matter disrupts federal-state relations because it deprives Vermont of the affirmative discretion exercised by responsible federal officers in their enforcement of federal laws. Indeed, the FCA operates largely by default – unless the United States takes affirmative action, the private *qui tam* plaintiff has the "right" to prosecute the case. 31 U.S.C. § 3730(c)(3). The FCA therefore insulates federal officials from having to exercise any discretion, while allowing the United States to obtain a portion of the benefit of any damages obtained by a private person under the FCA. State legal officers can convince the Department of Justice of the propriety of State actions only to have federal officers "watch from the sidelines" while the State mounts a costly defense to a matter supposedly brought on behalf of the United States. *United States ex rel. Long*, 173 F.3d at 885. And, the United States collects whatever monies the private plaintiff can obtain regardless of whether these monies represent the action's nuisance value or some other settlement or judgment. "That could be described as allowing the [federal] government to have its constitutional cake and eat it too." *Id.*

Third, a private *qui tam* plaintiff's ability to sue a State impairs federal-state relations on a political level. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-52 (1985) (federal government designed so that States may protect their interests through federal political process). A State's congressional delegation may legitimately

question, on behalf of a State, the correctness of federal agency decisions. *See* Pet. App. 74-76 (Weinstein, J. dissenting). Or, the United States may be influenced by more "subtle political pressures that might have precluded the lawsuit in the first place had the United States been more actively involved from the start." *Long*, 173 F.3d at 885. Yet, the *qui tam* device allows the United States to remove itself from political accountability.

The Federal Government's decision to sue a State is weighty and based on innumerable factors including, to name only a few, the public good, preservation of federal-state relations, costs to taxpayers, and impacts on State services and functions. To remove the United States from decision-making and accountability for such a suit has a critical impact on federal-state relations. Certainly, a private person's suit is at odds with the Federal Government's constitutional role because such a suit is not "at the instance and under the control of responsible federal officers," *Blatchford*, 501 U.S. at 785, nor is such a suit an "exercise of political responsibility." *Alden*, 119 S. Ct. at 2267.

2. Allowing an individual, nominally on behalf of the United States, to sue a State for treble damages, penalties, costs, expenses, and attorneys' fees "create[s] staggering burdens" that may threaten a State's financial integrity. *Alden*, 119 S. Ct. at 2264. This is especially true in light of the depth and complexities of the federal-state relationship and the concomitant transfers of public funds. The potential power of such suits "would pose a severe and notorious danger to the States and their resources" and provide individuals with "a leverage over the States that is not contemplated by our constitutional design." *Id.*

Vermont's police powers will be this suit's first victim. Vermont is a small state and its Agency of Natural Resources reflects Vermont's size. If this matter goes to trial, virtually all staff involved with Vermont's water supply and water quality programs will have to devote significant time to this matter's defense. This is time that would normally be devoted to protecting the public health and environment by fulfilling the mandates of the Clean Water and Safe Drinking Water Acts. In addition, time and resources that the Vermont Attorney General's Office would otherwise spend enforcing Vermont's public health and environmental laws are now dedicated to defending this matter. Vermont should be able to formulate policy, manage its resources and implement programs based on mutual understandings with EPA without fear of being second-guessed by private persons seeking a bounty or acting upon personal ill will.

C. QUI TAM SUITS UNDER THE FALSE CLAIMS ACT ARE COMMENCED AND PROSECUTED BY PRIVATE INDIVIDUALS AND THEREFORE ARE BARRED BY THE CONSTITUTION.

The Constitution, this Court's decisions and the policies favoring cooperative federalism all preclude the United States from delegating its sovereign authority to sue a State. Because the FCA does just that, it violates the Eleventh Amendment.

1. This matter was neither commenced, nor is it being prosecuted by the United States. It is based solely on an impermissible delegation of the United States' sovereign power. The FCA, under a provision entitled "Actions by private persons," states plainly that "[a] person may bring a civil action for a violation of section

3729 for the person and for the United States Government." 31 U.S.C. § 3730(b)(1).⁹ In *Hughes*, this Court recognized:

[t]hat a *qui tam* suit is brought by a private party 'on behalf of the United States' . . . does not alter the fact that a relator's interests and the Government's do not necessarily coincide. Moreover, as the statute specifies, *qui tam* actions are brought

⁹ The FCA is replete with provisions that acknowledge the sharp distinction between the United States and a private person who commences and prosecutes FCA suits. 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action"), 3730(b)(5) ("When a person brings an action . . . no person other than the Government may intervene or bring a related action"), 3730(c)(1) ("If the Government proceeds with the action . . . [it] shall not be bound by an act of the person bringing the action."), 3730(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action"), 3730(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action"), 3730(c)(2)(C) ("Upon a showing by the Government that unrestricted participation . . . by the person initiating the action"), 3730(c)(2)(D) ("Upon a showing by the defendant that unrestricted participation . . . by the person who initiating the action"), 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action."), 3730(c)(4) ("the person initiating the action"), 3730(c)(5) ("If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights"), 3730(d)(1) ("If the Government proceeds with an action brought by a person"), 3730(d)(2) ("If the government does not proceed with an action under this section, the person bringing the action or settling the claim"), 3730(d)(4) ("If . . . the person bringing the action conducts the action"), 3730(f) ("The Government is not liable for expenses which a person incurs in bringing an action").

both "*for the person* and for the United States Government."

520 U.S. at 949 n.5.

The United States had no control over plaintiff Stevens' commencement of this lawsuit. Indeed, the FCA does not allow the United States to prevent initiation of a suit by a private person. See 31 U.S.C. § 3730(b)(1). Rather, to preclude a private person's FCA suit, the United States' only option is to take the awkward, if not self-defeating step of filing its action first. See 31 U.S.C. § 3730(e)(3) (private person may not bring FCA suit based on allegations underlying proceeding in which United States is already a party).

Once a private person has commenced such an action, the United States becomes a party to the action if it "elect[s] to intervene and proceed with the action." 31 U.S.C. § 3730(b)(2). Such intervention, however, merely confers on the United States "primary responsibility" – not exclusive control over prosecution of the action. 31 U.S.C. § 3730(c)(1). When, as in this case, "the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3) (emphasis added). Indeed, the United States has assumed the passive, non-party role of being "served with copies of all pleadings filed in the action." Government's Notice of Election to Decline Intervention and Mot. to Extend Seal, D. Ct. Docket Entry No. 26 (June 26, 1996); see also 31 U.S.C. § 3730(c)(3). Jonathan Stevens has therefore commenced and is prosecuting this action against the State of Vermont.

Jonathan Stevens will not prosecute this matter to achieve the United States' aims, but rather his own. The Court in *Hughes* explicitly recognized that "[a]s a class of

plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." 520 U.S. at 949. This monetary reward can be substantial. The private person is entitled to between 15 and 30 percent of the proceeds of the action, depending on whether the United States intervenes. 31 U.S.C. § 3730(d)(1), (2). The "proceeds" include treble damages and civil penalties of up to \$10,000 per violation. *Id.* § 3729(a). The private person is also entitled to costs, expenses, and attorneys' fees. *Id.* § 3730(d)(1), (2). In addition, private persons also may have an interest in acting upon " 'personal ill will' " – an interest that certainly would not be shared by the United States. *United States ex rel. Marcus v. Hess*, 317 U.S. at 541 n.5 (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Moreover, the United States is making no effort to control Stevens' prosecution of this matter. The FCA does allow the United States, if it so chooses and can demonstrate good cause, subsequently to assert some control over an action conducted by a private person. See 31 U.S.C. § 3730(c)(3) ("When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause."). However, the United States has yet to exercise any control over this case, and its potential exercise of control does not alter the reality that an individual commenced this action and is now prosecuting this lawsuit directly against the State of Vermont. In short, the United States' inaction cannot be reconciled with any suggestion that the United States is responsible for commencing and prosecuting this matter.

Even if the United States eventually decided to exercise the control allowed by the FCA, the fact remains that an individual commenced this suit and retains independent rights in prosecuting the suit. Subsequent intervention does not give the United States authoritative control over the litigation. To the contrary, the FCA provides that such intervention (assuming the United States can show good cause) is only allowed "without limiting the status and rights of the person initiating the action." *Id.*

The FCA further protects the private person's right to prosecute FCA actions by allowing the Government to dismiss an action only if "the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A).¹⁰ Likewise, the Government may settle FCA actions commenced by a private person only "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B). Thus, on a functional level, this lawsuit was commenced and is being prosecuted by a private citizen against a State in violation of the Constitution.

¹⁰ The only published account of the United States moving to dismiss an FCA action brought by a private person is *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 794 (1999). *Sequoia Orange* well-illustrates the shortcomings of the United States' authority over FCA suits pursued by private persons. Once the United States finally decided that it would seek dismissal, it filed a motion to that effect in August of 1994. *Id.* at 1142. The private plaintiff objected and as a result, dismissal was not final until four years and four months later when this Court denied certiorari.

2. The United States itself acknowledges that the relator does not act on behalf of the United States, but instead acts in a private capacity.

Qui tam relators are not "Officers of the United States," and their selection is not governed by the Appointments Clause. Congress has not "established by Law" a government "Office" of FCA informer or relator. To the contrary, the Act's *qui tam* provision is entitled "ACTIONS BY PRIVATE PERSONS." 31 U.S.C. § 3730(b). Insofar as the Appointments Clause is concerned, the relator is more aptly analogized to a plaintiff who invokes a private right of action under a federal statute. Congress's decision to create a private right of action may often rest in part on its belief that such provisions will vindicate a societal interest in deterring and remedying violations of federal law by enlisting private individuals in the process by which the law is enforced. The fact that a private lawsuit assists in the effectuation of federal policy does not transform the plaintiff into an "Officer of the United States" whose selection is governed by the Appointments Clause.

Brief for the United States as Amicus Curiae at 19-20, *Hughes Aircraft Co. v. United States ex rel. Schumer* (On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit) (No. 95-1340) (Sept. 1996). See also Office of Legal Counsel, U.S. Dep't of Justice, *The Constitutional Separation of Powers between the President and Congress*, 1996 WL 876050, at *108-109 n.53.¹¹

¹¹ In *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 207 (1989), the U.S. Department of Justice, Office of Legal Counsel concluded, in part, that the FCA's *qui tam* provisions violate the Appointments

The United States has also taken the position that: *qui tam* suits under 31 U.S.C. § 3730(b), such as the present case, are not "commenced by the United States" for the purposes of this court's [of International Trade] jurisdiction because the Government may only choose to become a party after the suit has been "brought" by a private actor.

United States ex rel. Felton v. Allflex USA, Inc., 989 F. Supp. 259, 262 (Ct. Int'l Trade 1997) (describing the United States' argument as to whether FCA action was commenced by the United States for purposes of 28 U.S.C. § 1582).

The FCA's provisions, relevant case law, and the United States' views of the FCA all confirm that this matter was commenced and is being prosecuted by Jonathan Stevens – not the United States. In sum, the State of Vermont is being subjected to suit commenced and prosecuted by a private person in violation of the Constitution.

D. THE COURT OF APPEALS' HOLDING THAT PRIVATE PERSONS CAN SUE A STATE IF THE UNITED STATES IS A "REAL PARTY IN INTEREST" CANNOT BE RECONCILED WITH THE BLATCHFORD/ALDEN RULE.

The court of appeals held that because the United States is "the real party in interest" to FCA actions, this

Clause and Article III standing doctrine. In 1996, the United States partially superseded this opinion by disavowing the portion of the opinion that concluded that the *qui tam* provisions violate the Appointments Clause. Office of Legal Counsel, U.S. Dep't of Justice, *The Constitutional Separation of Powers between the President and Congress*, 1996 WL 876050, at *108-109 n.53.

"suit is in essence by the United States and hence is not barred by the Eleventh Amendment." Pet. App. 17-18. It also concluded that *Blatchford* is immaterial to this matter because the *Blatchford* plaintiffs were suing for their own benefit rather than for that of the United States.¹² Pet. App. 18.

1. Whether or not the United States is a "real party in interest" is irrelevant to Vermont's sovereign immunity. The United States' presence as a party, or, as is the case here, its mere name on the caption, does not eliminate the States' sovereign immunity with regard to a party that is not the United States and is not under the United States' control. In *Pennhurst II*, private plaintiffs were seeking to avoid the Eleventh Amendment's bar by arguing that the United States' active participation as an actual co-plaintiff eliminated any Eleventh Amendment immunity. The Court disagreed:

We also do not agree with [private plaintiff] respondents that the presence of the United States as a plaintiff in this case removes the Eleventh Amendment from consideration. Although the Eleventh Amendment does not bar the United States from suing a State in federal court, *the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes.*

465 U.S. at 104 n.12 (emphasis added) (citation omitted). Thus, assuming that the United States is the real party in

¹² The court of appeals' assumption that *qui tam* suits in fact benefit the United States is suspect. See Pet. App. 18. As detailed in *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 207, 215-220 (1989), a private person's decision to initiate suit, conduct of the litigation, and resulting judgment or settlement are often adverse to the United States' interests.

interest does not mean that a private person can commence and prosecute this lawsuit. If the United States' actual presence in a lawsuit is not sufficient to allow a private party to sue a State, then it follows, *a fortiori*, that the Federal Government's mere potential interest in the litigation is insufficient to allow a private person to commence and prosecute an action against a State.

2. The court of appeals' attempt to distinguish *Blatchford* on the grounds that the *Blatchford* plaintiffs were suing for their own benefit rather than for the benefit of the United States is also unfounded. Under *Blatchford* and *Alden* the Court identifies who is responsible for and in control of the suit – not who benefits from the suit – to determine whether the suit is brought by the United States. *Blatchford*, 501 U.S. at 785; *Alden*, 119 S. Ct. at 2269.

Moreover, resting this determination on potential benefit to the United States instead of whether the United States is ultimately responsible for the action is flatly inconsistent with the larger body of this Court's sovereign immunity decisions. The Court has never allowed sovereign authority to be exercised by any person or entity other than the sovereign. For example, the Court has consistently held that sovereign immunity lies exclusively with States or arms of the States. See *Alden*, 119 S. Ct. at 2267 ("The second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities."); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) ("State and its 'arms' are, in effect, immune from suit in federal court"). Likewise, only the United States or its instrumentalities may assert the United States' sovereign immunity. See, e.g., *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (setting out test for determining if defendant is United

States or its instrumentality for purposes of United States' sovereign immunity).

In *Regents of the Univ. of Cal. v. John Doe*, 519 U.S. 425 (1997) – a case that addressed the mirror image of the issues presented here – this Court would not look past the State to determine California's Eleventh Amendment protections:

The respondents seek to detach the importance of a State's legal liability for judgments against a state agency from its moorings as an indicator of the relationship between the State and its creation and to convert the inquiry into a formalistic question of ultimate financial liability. But none of the reasoning in our opinions lends support to the notion that the presence or absence of a third party's undertaking to indemnify the agency should determine whether it is the kind of entity that should be treated as an arm of the State.

Just as with the arm-of-the-state inquiry, we agree . . . that with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability rather than its ability or inability to require a third party to reimburse it, or discharge the liability in the first instance, that is relevant. Surely, if the sovereign State of California should buy insurance to protect itself against potential tort liability to pedestrians stumbling on the steps of the State Capitol, it would not cease to be "one of the United States."

Id. at 430-31. The fact that a third party would relieve California of potential financial liability does nothing to alter the fact that the defendant is a State. Likewise, the fact that the United States could potentially benefit from FCA actions pursued by private persons does nothing to alter the fact that this matter was commenced and is

being prosecuted by a private person – not a responsible executive branch officer of the United States.

In light of these decisions, it would be aberrant to allow the blanket delegation of the United States' sovereign authority to sue a State to any private person seeking a bounty. Rather, consistent with the plan of convention, only the "United States – at the instance and under the control of responsible federal officers," may exercise its sovereign exemption from Eleventh Amendment limitations. *Blatchford*, 501 U.S. at 785.

* * *

The pertinent inquiry here is whether the United States, through a responsible executive branch officer, commenced and is prosecuting this matter. The answer to this inquiry is clear: a private person motivated by a potential bounty commenced and is prosecuting this suit against the State of Vermont pursuant to a delegation of the United States' sovereign authority to sue a State. Such a suit violates Vermont's constitutionally recognized sovereign immunity. This Court should therefore reverse the court of appeals and hold that only the United States itself may exercise its sovereign authority to sue the State of Vermont.

CONCLUSION

The decision of the court of appeals should be reversed and the case dismissed for want of jurisdiction.

Respectfully submitted,

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September 3, 1999

APPENDIX 1

[LOGO] UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION I
JOHN F. KENNEDY
FEDERAL BUILDING
BOSTON, MASSACHUSETTS
02203-0001

February 20, 1998

E. Hale Ritchie, Business Manager
Vermont Department of Environmental Conservation
103 South Main Street
Waterbury, VT 05676

Dear Mr Ritchie:

The Environmental Protection Agency, Region 1 (EPA), has concluded our review of Vermont Department of Environmental Conservation's (DEC) compliance with the revised provisions of the Office of Management and Budget Circular No. A-87, "Cost Principles for State, Local, and Indian Tribal Governments," as revised May 4, 1995 (revised Circular A-87). EPA's review focused on the process used by DEC to document time distribution of salaries and wages (see revised Circular A-87, Attachment B, Section 11(h)).

We have reviewed the information contained in your submissions dated April 21, 1997 and June 4, 1997, as well as information provided by you in a May 19, 1997 supplemental discussion with EPA. Based upon this information, DEC has demonstrated that the Comprehensive Management System that was implemented by DEC on May 25, 1997 tracks the actual amount of time that employees spend on each activity, as required by the

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revised Circular A-87. Therefore, EPA has concluded that DEC is currently in compliance with the revised Circular A-87.

Please note that based upon our review, the procedures in place prior to May 25, 1997 complied with the requirements of the 1981 version of Circular A-87, which was in effect until the first awards made after September 1, 1995. However, following this date, these procedures did not comply with the revised Circular A-87 (effective May 4 1995) for awards made after September 1, 1995, because they did not reflect an after the fact accounting distribution of the actual activity of each employee as required in revised Circular A-87, Attachment B, Section 11(h)(5)(a). While these procedures did not comply with the revised Circular A-87, we note that our review did not uncover any improprieties in the time charges during this period.

This determination constitutes final agency action unless a request for review is filed with the Regional Administrator pursuant to 40 C.F.R. Part 31, Subpart F, within 30 calendar days from the date of this determination. (See attached regulations).

We appreciate your timely response to our concerns regarding this matter. If you have any questions, please do not hesitate to call me at (617) 565-3355, or Janet

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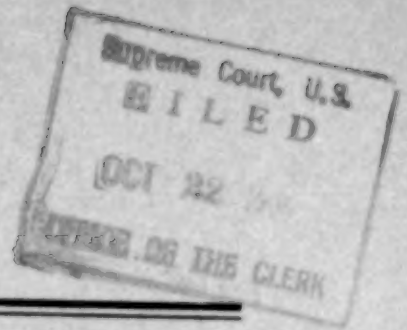
Bartlett, our grants management specialist for Vermont at (617) 565-4528.

Sincerely,

/s/ Stephen S. Perkins
Stephen S. Perkins, Director
Office of Administration & Resource Management

cc: John Kassel, VT ANR
Canute Dalmassee, VT DEC
Lynne Hamjian

(15)
No. 98-1828



IN THE
Supreme Court of the United States

STATE OF VERMONT
AGENCY OF NATURAL RESOURCES,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL.
JONATHAN STEVENS,
Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a *qui tam* suit against a State under the False Claims Act is barred by the Eleventh Amendment.
2. Whether a State is a "person" subject to suit under the False Claims Act, 31 U.S.C. § 3729 *et seq.*

PARTIES TO THE PROCEEDING

All parties to the proceedings below appear in the caption.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution and the relevant provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, are set forth at Pet. App. 91-125. The Property Clause of the United States Constitution, U.S. Const. art. IV, § 3, cl. 2, provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

STATEMENT

1. The False Claims Act "was originally passed in 1863 after disclosure of widespread fraud against the Government during the War Between the States." *Rainwater v. United States*, 356 U.S. 590, 592 (1958); *see United States v. Bornstein*, 423 U.S. 303, 309 (1976). "Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *United States v. McNinch*, 356 U.S. 595, 599 (1958). In order "to provide protection against those who would 'cheat the United States,'" *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943) (citation omitted), and "broadly to protect the funds and property of the Government," *Rainwater*, 356 U.S. at 592, Congress made it illegal "to present or cause to be presented for payment or approval * * * any claim upon the Government of the United States * * * knowing such claim

to be false, fictitious, or fraudulent." Act of March 2, 1863, ch. 67, § 1, 12 Stat. 696.

The Act, which was substantially rewritten, expanded, and enacted afresh in 1986, now makes "any person" who knowingly presents a false or fraudulent claim to the United States "liable to the United States Government for a civil penalty" not exceeding \$10,000 "plus 3 times the amount of damages which the Government sustains." 31 U.S.C. § 3729. As it has in substance since 1863, the Act directs federal prosecutors to "diligently investigate" violations of the Act, and it authorizes them to "bring a civil action * * * against the person" that submitted the false claim. 31 U.S.C. § 3730(a). The Act also provides, as did the original statute, an additional enforcement mechanism in the form of a "*qui tam*" suit: it authorizes "[a] person [to] bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b).

A person who brings a *qui tam* action (called a "relator") must file his complaint in camera and under seal. The complaint and a "written disclosure" of the facts on which the relator bases his complaint must be served on the Attorney General and on the local United States Attorney. 31 U.S.C. § 3730(b)(2). The complaint, however, may "not be served on the defendant until the court so orders," usually after it is unsealed. The complaint must remain under seal for at least 60 days—a period that may be extended by leave of the court—while government attorneys investigate the complaint's allegations. By the end of that 60-day period (and any extensions) the Attorney General must inform the district court whether government attorneys will take over the action. *Ibid.*

If government attorneys do take over the case, they "have the primary responsibility for prosecuting the action," and

they may, subject to court approval, dismiss it altogether "notwithstanding the objections of the [relator]," compromise it, or prosecute it to judgment. *Id.* at § 3730(c)(2). If the Attorney General elects *not* to take over the case, on the other hand, the relator may prosecute the action in the name of the United States—but he must do so at his own expense and may become liable for the defendant's attorneys fees and expenses if the suit later is found by the court to be frivolous or vexatious. *Id.* at §§ 3730(c)(3), 3730(d)(4), 3730(f). Moreover, the Attorney General still retains the right to intervene and litigate the action upon "a showing of good cause." *Id.* at § 3730(c)(3). A portion of any recovery by the United States—whether or not the Attorney General elected to take over the litigation—must be shared with the relator.

2. Respondent Jonathan Stevens commenced this *qui tam* action against the State of Vermont Agency of Natural Resources ("VANR") in May 1995. The allegations of the complaint, which "must" be presumed to be true "for the purpose of disposing of the jurisdictional issue[s]" raised by this case, *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 374 (1945); see *Ickes v. Fox*, 300 U.S. 82, 96 (1937), disclosed that VANR systematically defrauded the United States Government by instructing its employees to prepare documents that falsely certified that those employees had worked on matters funded by certain federal grants administered by the United States Environmental Protection Agency ("EPA"). Pet. App. 6-7.

The EPA administers a number of federal grants under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* As a recipient of federal funds under those grants, VANR must meet certain reporting requirements, including the submission of time-and-attendance records that reflect the amount of time spent by VANR employees on activities that qualify for federal

grant money. Pet. App. 6. Mr. Stevens was employed as an attorney by the Water Supply Division of the Department of Environmental Conservation, an arm of VANR. While Mr. Stevens was employed by VANR, he and his fellow employees were instructed by their superiors to complete time-and-attendance records that falsely reflected that their time was being spent on grant-eligible tasks. *Id.* at 6-7. Indeed, employees were told to fill out time-sheets *in advance*, and to allocate specific proportions of their reported time to particular federal grant codes that were dictated by agency supervisors. Those allocations bore no relation to the tasks actually performed by VANR employees. *Id.* at 6; *see also* Relator's Written Disclosure of Material Evidence and Information at 4 ("Written Disclosure").¹

The Written Disclosure that Mr. Stevens submitted to the Attorney General in accordance with the Act documented those allegations in detail, including contemporaneous VANR memoranda allocating employee hours to federal grants in advance of any work being performed.² The Written Disclosure showed that Mr. Stevens repeatedly had questioned his supervisors' orders, pointing out that the time

¹ Because the False Claims Act requires that the Written Disclosure be served on the Attorney General, and because that disclosure forms the basis for her investigation and ultimate decision concerning intervention, Mr. Stevens has lodged copies of the Written Disclosure with the Clerk.

² In one e-mail exchange, a VANR supervisor instructed an employee to continue using the codes prescribed for federal funding even though, three months into the fiscal year, she no longer had federal responsibilities; the State later reported that 95% of her time during that year had been devoted to those responsibilities. Written Disclosure at Tabs G, H, I.

forms he was required to complete required him personally to certify falsely "under the pains and penalties of perjury * * * that the for[e]going report does accurately reflect the time worked * * *." *See* Written Disclosure, at Tab L. Mr. Stevens also alerted his supervisors to the criminal penalties prescribed by state law for making false statements to governmental bodies, and reminded his supervisors that, as an attorney, he was required by the Code of Professional Responsibility to take a "proactive role" in urging a client to rectify an ongoing fraud and, if necessary, to reveal the fraud to the affected person or tribunal. *Id.* at Tab O. Mr. Stevens additionally sought a meeting, and did meet, with the Secretary of VANR in order to apprise him of the agency's improper conduct. *Id.* at 5.

Mr. Stevens' efforts proved wholly unavailing. The General Counsel of VANR warned Mr. Stevens that he "should choose [his] battles more carefully." Written Disclosure at 6. Other employees who questioned VANR's practices "were told that if they wanted to keep their jobs they should not raise this issue." *Id.* at 4. In the end, VANR simply "failed to change its practices or make any effort to account for the discrepancies." *Id.* at 7. In fact, VANR "never has maintained any accounting procedure to verify that pre-allocated employee hours assigned to federal grant funding sourcing codes were actually worked," and no adjustments have ever been made "to account for, or even identify, discrepancies" between hours worked and the arbitrary pre-allocated figures. JA 38 (¶¶ 33-34).

3. The Attorney General investigated the allegations of the complaint and its supporting materials from May 1995 until June 1996. Pet. App. 7. The Attorney General then informed the court that federal prosecutors would not take over the action, but she did not intervene, as was her statutory right, to terminate the suit. Instead, she expressly reserved

her statutory right to intervene against the State at a later time as the case proceeded. *Id.* She also requested to be served with copies of all pleadings filed in the case. *Id.*

After the complaint was unsealed and served upon Vermont, the State moved to dismiss it. JA 7. Vermont contended that States and their instrumentalities are not persons under the Act and that, in any event, this suit is barred by the Eleventh Amendment. Pet. App. 8. The United States, appearing as *amicus curiae*, opposed the State's motion, noting that despite the Attorney General's election not to take over the litigation, "the United States remains the real party in interest in this * * * *qui tam* action * * *." U.S. Memorandum In Opposition to Defendant's Motion To Dismiss at 1; *see also id.* at 7 ("the United States remains the real party in interest and, ultimately, the primary beneficiary should the relator's efforts prove successful.")

The district court denied Vermont's motion to dismiss. Pet. App. 86-87. The court first rejected Vermont's Eleventh Amendment claim, agreeing with the Attorney General's position that "the Eleventh Amendment does not bar suits such as the instant one because the United States, which has the ability to sue a state, is the real party in interest and ultimately the primary beneficiary of a successful *qui tam* action." *Id.* at 86. The court also rejected Vermont's claims that States are not "persons" under the Act, noting that States can be "persons" when they appear as plaintiffs under the Act and "identical words used in different parts of the same act should be afforded the same meaning." *Id.* at 87 (citing *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996)).

4. Vermont took an interlocutory appeal from the district court's Eleventh Amendment ruling, as permitted by *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The United States intervened to

defend the district court's decision. Pet. App. 9. The court of appeals affirmed. Pet. App. 1-30.

In rejecting Vermont's claim of Eleventh Amendment immunity, the court of appeals found dispositive the nature of "[t]he interests to be vindicated, in combination with the government's ability to control the conduct and duration of the *qui tam* suit." Pet. App. 16. In particular, the court agreed with the district court's conclusion that "[t]he real party in interest in a *qui tam* suit is the United States." The court reasoned:

All of the acts that make a person liable under § 3729(a) focus on the use of fraud to secure payment from the government. It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share * * * of any recovery.

Id. The court also emphasized that "the government has the right to control the action" by intervening, has "the right to be kept abreast of discovery" even if it does not intervene, and "has both the right to prevent a dismissal sought by the *qui tam* plaintiff and the right to cause the action to be dismissed for any rational governmental reason, notwithstanding the *qui tam* plaintiff's desire that it continue." *Id.* at 17.

Those factors established, the court found, that a *qui tam* suit "is in essence a suit by the United States and hence is not barred by the Eleventh Amendment" (Pet. App. 18), because "[a]s against the United States * * * the States have no sovereign immunity." *Id.* at 15. The court rejected the contention that a contrary conclusion was required by *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), which held

that the Eleventh Amendment bars Indian tribes from directly suing States on claims that the United States might have brought against those States on the tribes' behalf. The court found it "plain[]" that "in those circumstances * * * the injury to be remedied was one to the tribes, not to the federal government, and the cause of action did not belong to the government." Pet. App. 18.

Vermont also sought interlocutory review of the district court's conclusion that States are "persons" under the Act. The court of appeals purported to exercise "pendent appellate jurisdiction" over that statutory question and affirmed. Pet. App. 19. The court first rejected Vermont's contention that a "plain statement" of Congress' intent to render States liable is required here, explaining that "[t]he Act does not intrude into any area of traditional state power" since the "[t]he goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud." *Id.* at 20-21.

The court then concluded that "[u]nder the usual standards" of construction, Congress plainly intended for the Act to authorize suits against States. *Id.* at 21. The court of appeals found significant the fact that the term "person" is "used to categorize both those who may sue and those who may be sued, whether by the government itself or by a *qui tam* plaintiff." Pet. App. 21. The court noted that States have brought suit under the Act as *qui tam* plaintiffs, and that the 1986 legislation reinforced a State's ability to do so by permitting joinder, in an action under the Act, of related state-law claims seeking money for the benefit of a State. *Id.* at 22-23. The court concluded that States are plainly "persons" under the Act, because courts "normally infer that in using the same word in more than one section of a statute—or indeed twice within the same section, as in subsections (a) and (b) of § 3730—Congress meant the word to have the same meaning." *Id.* at 23-24.

The court of appeals also noted that its interpretation of the term "person" is supported by the Senate Report that accompanied the 1986 law. Pet. App. 25-27. That report expressly stated that the term "'person' is used in its broad sense to include * * * States and political subdivisions thereof." *Id.* at 27-28 (quoting S. REP. No. 345, 99th Cong., 2d Sess. 8 (1986)).

District Judge Weinstein, sitting by designation, dissented. Pet. App. 31-85.

SUMMARY OF ARGUMENT

Vermont presents two questions for review: whether States are "persons" under the Act and whether the States' sovereign immunity precludes *qui tam* suits against States. Although the court of appeals addressed both issues, its jurisdiction in this interlocutory case was limited to the question of immunity. The court of appeals' assertion of "pendent appellate jurisdiction" over Vermont's statutory claim cannot be squared with *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), which precludes appellate consideration of issues not independently appealable or certified as such by the district court. Because only the Eleventh Amendment ruling was properly the subject of interlocutory review, Mr. Stevens will address that claim before addressing the State's statutory defense.

I. This Court has consistently held that questions of sovereign immunity must be resolved by evaluating whether a State or the United States is the real party in interest. Because suits under the False Claims Act vindicate the sovereign proprietary interests of the United States, the United States is indisputably the real party in interest in such suits. Few principles are better established in the field of sovereign immunity than that States have no Eleventh Amendment immunity as against the United States. *See*

United States v. Texas, 143 U.S. 621 (1892). Vermont's sovereign immunity defense, therefore, must fail.

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), and *Alden v. Maine*, 119 S. Ct. 2240 (1999), do not establish, as Vermont contends, that the United States can be a party to litigation only when Executive Branch officials personally conduct the litigation. Those cases instead address an issue different from that presented here, because they involved suits by private individuals seeking to enforce their *own* personal federal rights. What is at issue in this case, by contrast, is whether Congress may authorize *qui tam* litigation against States when the United States' own property rights are at issue. Neither *Blatchford* nor *Alden* speaks to that question.

While Executive Branch participation may be necessary to demonstrate the sovereign's interest in suits that appear to redress purely *private* grievances, it is *not* necessary in suits under the Act. *Every* suit under the False Claims Act—be it initiated by the Attorney General or by a *qui tam* relator—vindicates the proprietary interest of the United States. Because Congress has exceptionally broad authority in respect of those interests (see U.S. Const. art. IV, §3, cl. 2), it was assuredly within its constitutional authority to vindicate those interests through the *qui tam* mechanism, a form of action that was well known to the Framers. And in any event, even if *Blatchford* and *Alden* could plausibly be read to require some level of control by Executive Branch officials, *qui tam* litigation under the Act would meet any test that this Court might reasonably fashion in that regard.

II. Were the Court to reach Vermont's statutory argument, it would have to reject Vermont's interpretation of the Act. The words "any person" in the Act plainly encompass States of the Union, a conclusion buttressed by the civil investigative demand provisions of the Act, which unam-

biguously define States as "persons," and by the undisputed proposition that States are "persons" that can initiate *qui tam* proceedings under the Act as relators. Vermont errs in contending that Congress need have made a "plain statement" of its intent to subject States to suit, because the Act is not ambiguous. Accordingly, should the Court reach Vermont's statutory claim, it must affirm the judgment of the court of appeals on this ground as well.

ARGUMENT

I. THE UNITED STATES MAY USE THE "*QUI TAM*" VEHICLE TO SUE A STATE OF THE UNION FOR FRAUDULENTLY OBTAINING FEDERAL PROPERTY

The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Although by its literal terms the amendment "would appear to restrict only the Article III diversity jurisdiction of the federal courts," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996), this Court has concluded that the text of the amendment is not controlling. Thus, the Court has held that the amendment shields States from suits by their own citizens, *Hans v. Louisiana*, 134 U.S. 1 (1890), by foreign countries, *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), and by Indian tribes, *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). Similarly, the Court has ruled that the amendment applies in federal question cases, see *Hans*, *supra*, and—withstanding the textual limitation to "suits in law or equity"—to certain suits in admiralty as well. See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987); *Ex parte New York*, No. 1, 256 U.S. 490 (1921).

Because it is now settled that the Eleventh Amendment embodies general principles of sovereign immunity that antedate the Constitution, rather than any particular rule discernable from its text (*Alden v. Maine*, 119 S. Ct. 2240, 2250-53 (1999)), it is surprising that so much of Vermont's argument is predicated on the purely text-based argument that *qui tam* suits are "commenced" or "prosecuted" "by" private individuals. *E.g.*, Vt. Br. 29, 30, 43, 45; *see also* Brief of the National Governors' Association *et al.* as *Amici Curiae* 27. In fact, Vermont's entire argument proceeds as though the Second Circuit—whose conclusion is in accord with the views of all but one court of appeals to consider the constitutional question presented here—had invented the real-party-in-interest inquiry out of whole cloth.³ According to Vermont, the Second Circuit's analysis "is flatly inconsistent with the larger body of this Court's sovereign immunity decisions" (Vt. Br. 47), because under an inflexible "rule" (*id.* at 34) purportedly adopted by this Court in *Blatch-*

³ Of the five courts of appeals that have ruled on the question, only the Fifth Circuit has held that the Eleventh Amendment precludes *qui tam* suits brought against States under the False Claims Act. *See United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279, *petition for cert. filed*, 68 U.S.L.W. 3138 (Aug. 23, 1999). The majority view is that the Eleventh Amendment has no bearing on such suits because the United States is the real party in interest. *See United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998), *cert. dismissed*, 119 S. Ct. 2387 (1999); *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998) (decision below); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995); *United States ex rel. Milam v. University of Texas*, 961 F.2d 46 (4th Cir. 1992).

ford and reaffirmed in *Alden*, the question of sovereign immunity turns on "who is responsible for and in control of the suit—not [on] who benefits from the suit." *Id.* at 47, 31-32.

It is Vermont's position, however, that cannot be reconciled with this Court's sovereign immunity cases. In a long line of authority—which Vermont does not even cite, much less attempt to distinguish—this Court has consistently held that questions of immunity must be resolved by inquiring whether a State or the United States "is the real party in interest." *E.g.*, *Kansas v. United States*, 204 U.S. 331, 341 (1907). Far from stating a "rule" to the contrary, *Blatchford* is one of several cases in which this Court has enforced the real-party-in-interest inquiry by requiring proof that some sovereign or quasi-sovereign interest is actually at stake when a suit appears solely to benefit private persons. That concern has no relevance here, because suits under the False Claims Act plainly vindicate the sovereign proprietary interests of the United States—interests over which Congress has plenary authority and which no State is empowered to hinder. *See* U.S. Const. art. IV, §3, cl. 2. Nothing in the Eleventh Amendment prevents Congress from vindicating those sovereign interests against a State through a *qui tam* suit, a form of action that was well known to the Framers of the Constitution, especially in light of the numerous provisions of the Act that ensure that modern *qui tam* litigation is subject to Executive Branch control. Indeed, even if Vermont were correct that "control" rather than real-party status determines the sovereign immunity issue, the Attorney General's right to control litigation under the Act would more than suffice to meet any such requirement.

A. States Of The Union Have No Eleventh Amendment Immunity Against The United States

1. This Court first explicitly addressed whether the United States may sue a State in *United States v. Texas*, 143 U.S. 621 (1892), a dispute over the ownership of property—a tract of land—claimed by both sovereigns. Congress, by statute, had directed the Attorney General to commence suit on behalf of the United States “in order that the rightful title to said land may be finally determined.” *Id.* at 622 (Statement of the Case, quoting Act of May 2, 1890, ch. 182, § 25, 26 Stat. 81, 92). Texas demurred, asserting that the United States did not have the constitutional authority to bring suit against a State in federal court. Indeed, in an argument that recalls the “cooperative federalism” contentions advanced by Vermont here (*e.g.*, Vt. Br. 34-35), “Texas insist[ed] that no such jurisdiction has been conferred [by the Constitution], and that the only mode in which the * * * dispute [could] be peaceably settled [was] by agreement, in some form, between the United States and that State.” 143 U.S. at 641.

This Court decisively rejected Texas’ claim. The Court was unwilling to presume that the Framers “overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States,” especially since the Constitution expressly makes other inter-sovereign controversies cognizable in federal court. *Texas*, 143 U.S. at 644-45. As the Court put it, “the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union,” could not have “intended to exempt a State altogether from suit by the General Government.” *Ibid.* While acknowledging the limitations placed by the Eleventh Amendment on the jurisdiction of the federal courts (*id.* at 645-46), the Court emphasized that the Consti-

tution necessarily makes States amenable to “the suit of the government established for the common and equal benefit of the people of all the States.” *Id.* at 646.

2. As this Court has observed, *Texas* established that the United States may sue a State of the Union “without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan.” *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934); *see also United States v. Michigan*, 190 U.S. 379, 396 (1903). And since *Texas*, this Court has repeatedly reaffirmed that “nothing” in the Eleventh Amendment “or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State’s being sued by the United States.” *United States v. Mississippi*, 380 U.S. 128, 140 (1965). To the contrary, “[t]he United States in the past has in many cases been allowed to file suits in this and other courts against States * * * with or without specific authorization from Congress.” *Ibid.* Accordingly, it is now established, and it cannot reasonably be disputed by Vermont here, that “States have no sovereign immunity as against the Federal Government.” *West Virginia v. United States*, 479 U.S. 305, 311 (1987).

B. This Court Has Applied A Real-Party-In-Interest Test To Determine Whether The United States Is A Party to Litigation

Although one would not know it from Vermont’s brief, this Court has long held that “[t]he question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the *effect* of the judgment or decree that can be entered.” *Kansas*, 204 U.S. at 341 (emphasis added); *accord Dugan v. Rank*, 372 U.S. 609, 620-21 (1963); *Oregon v. Hitchcock*, 202 U.S. 60, 69-70 (1906). The question is determined, in other words, not by the executive-officer “rule” advocated by

Vermont, but by asking whether "the United States [is] the real party in interest." *Naganab v. Hitchcock*, 202 U.S. 473, 476 (1906).

The real-party-in-interest doctrine was originally developed by this Court in a series of Eleventh Amendment cases involving suits against individuals who claimed sovereign immunity on the basis of their official duties on behalf of a State, and soon was extended to suits by one State against a sister State—in which the Court dismissed suits brought on behalf of States by their respective attorneys general after concluding that the putative plaintiffs were not the real parties in interest. In light of the "correlation between sovereign immunity principles applicable to States and the Federal Government," *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998), this Court long ago held that the same real-party-in-interest principles "must apply to the United States." *Kansas*, 204 U.S. at 341; *Minnesota v. Hitchcock*, 185 U.S. 373, 387 (1902). Those Eleventh Amendment cases, therefore, control the inquiry here.

1. The real-party-in-interest rule was not always the touchstone for this Court's sovereign immunity jurisprudence. In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), for example, this Court rejected an Eleventh Amendment defense to a suit against State officials, announcing "as a rule, which admits of no exception, that in all cases where jurisdiction depends on a party, it is the party named in the record." *Id.* at 857-58. The Court generally followed *Osborn's* party-of-record rule well into the 19th century, repeatedly rejecting the Eleventh Amendment pleas of state officers who had been sued in their official capacities. See, e.g., *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1872). In *In re Ayers*, 123 U.S. 443, 487-508 (1887), however, the Court discarded *Osborn* altogether and held that a suit against state officers is a suit against the State for pur-

poses of the Eleventh Amendment when the relief prayed for would constitute performance of one of the State's obligations. See *Ex parte Young*, 209 U.S. 123, 150-51 (1908). And "that construction of the Amendment has since been followed." *Missouri, Kansas & Texas Ry. Co. v. Missouri R.R. & Warehouse Comm'rs*, 183 U.S. 53, 59 (1901).

The modern rule is that "what is to be deemed a suit against a State * * * is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *Ex parte New York, No. 1*, 256 U.S. at 500 (emphasis supplied). Thus, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity" even if private parties, who obviously are not themselves the State, are the named defendants. *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459, 464 (1945). In other words, "the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984) (emphasis in original); accord *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269-70 (1997).

2. This Court's cases make clear that the same real-party-in-interest inquiry is also required when a State seeks to proceed as a plaintiff in a suit against a sister State—the situation most analogous to suits, such as this one, in which the United States seeks redress of its claims against one of the States. Federal courts may exercise jurisdiction in such State-against-State cases only if the suit is brought to further the plaintiff State's own substantial interests, and is not merely "a controversy in the vindication of grievances of particular individuals." *Louisiana v. Texas*, 176 U.S. 1, 16 (1900).

That rule is exemplified by the leading case of *New Hampshire v. Louisiana*, 108 U.S. 76 (1883). The States of New Hampshire and New York had enacted statutes permitting their citizens to assign to their respective States any past due bonds issued by another State, and to deliver such bonds, together with the costs of suit, to the States' attorneys general for collection. *Id.* at 76-79. In reliance on their respective State statutes, the attorneys general of New Hampshire and New York brought original actions in this Court seeking to collect on past-due bonds issued by the State of Louisiana.

Although each cause was ostensibly commenced and prosecuted in the name of a State by its attorney general (108 U.S. at 78, 81)—and thus undoubtedly met the executive-officer "rule" that Vermont urges in this case as the true test for sovereign immunity questions—this Court dismissed both suits. The Court was satisfied that the suits "were in legal effect commenced, and [were being] prosecuted, *solely* by the owners of the bonds and coupons." *Id.* at 89 (emphasis added). The Court emphasized that the bond owners paid the expenses of the suit, had the authority to compromise it, "and if any money is ever collected, it must be paid to [them]." *Ibid.* Because it was plain from those facts "that both the State and the attorney-general are only nominal actors in the proceeding," *ibid.*, the suit was barred by the Eleventh Amendment. See *Missouri v. Illinois & Sanitary Dist. of Chicago*, 180 U.S. 208, 231 (1901) (reaffirming reasoning of *New Hampshire*). As the Court later noted, "the effort * * * to use the name of the complainant States in order to evade the application of the Eleventh Amendment" failed because "the State was not seeking a recovery in its own interest, as distinguished from the rights and interests of the individuals who were the real beneficiaries." *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-93 (1938).

In *South Dakota v. North Carolina*, 192 U.S. 286 (1904), by contrast, private holders of certain North Carolina bonds—who concededly were barred by the Eleventh Amendment from suing to collect the debt—*donated* a number of the bonds to South Dakota, which then brought an original action to recover on them. *Id.* at 310. This Court rejected North Carolina's Eleventh Amendment defense, explaining that the bonds were "not held by the State as representative of individual owners, as in [*New Hampshire*], for they were given outright and absolutely to the State." *South Dakota*, 192 U.S. at 310. Unlike the cases framed by New Hampshire and New York, "[t]he title of South Dakota [was] as perfect as though it had received the[] bonds directly from North Carolina." *Id.* at 312. Because "the clear import of the decisions of this court * * * [was] in favor of its jurisdiction over an action brought by one State against another to enforce a property right," *id.* at 318, the Court concluded that South Dakota was the real party in interest. The Court overruled North Carolina's Eleventh Amendment defense, in other words, because "[t]he case was * * * one 'directly affecting the property rights and interests of a State.'" *Oklahoma ex rel. Johnson*, 304 U.S. at 393 (quoting *South Dakota*, 192 U.S. at 314, 318).⁴

⁴ In *Missouri, Kansas & Texas Railway Co. v. Missouri Railroad and Warehouse Comm'n's*, *supra*, the Court examined whether a suit brought by individuals—certain railroad commissioners—should be characterized, for purposes of removal jurisdiction, as a suit by the State of Missouri. The Court decided that issue by relying on its Eleventh Amendment real-party precedents, explaining that "it may be fairly held that the State is such a real party" when the relief would inure to the State's benefit "and * * * the judgment or decree, if for the plaintiff, will effectively operate"

3. Vermont does not address this Court's cases establishing that questions of sovereign immunity—whether the party defendant is entitled to immunity or whether the party plaintiff is a sovereign who may sue despite that immunity—turn on real-party-in-interest status, and must therefore be decided on the basis of “the essential nature and effect of the proceeding.” *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 374 (1945). Vermont contends instead that *Blatchford* and *Alden* adopted a “rule” that the United States is a party *only* when a case is actively prosecuted by Executive Branch officials. *E.g.*, Vt. Br. 32, 34. Leaving aside the fact that the language on which Vermont relies was unnecessary to the judgment in each of those cases, and thus scarcely could be taken to promulgate a “rule” of any sort, *see, e.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994), both *Blatchford* and *Alden* in fact reflect the traditional understanding that sovereign immunity questions turn on real, rather than nominal, parties. Thus, neither case supports Vermont's position here.

In both *Blatchford* and *Alden* individuals attempted to sue a State in order to assert *their own rights*, rather than any rights of the United States as a sovereign. In *Blatchford*, Indian tribes sued State officials to recover money that the tribes allegedly were owed under a state revenue-sharing statute. *Alden* was a suit against the State by a group of the State's employees, who sought compensatory and liquidated

[Footnote continued from previous page]

in the State's favor. 183 U.S. at 59. Under that test, the Court concluded, the suit was *not* one by the State of Missouri, because it was “not an action to recover any money for the State” and “[i]ts results [would] not enure to the benefit of the State as a State in any degree.” *Ibid.*

damages for the State's alleged violation of their rights under the overtime provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, codified as amended at 29 U.S.C. § 201 *et seq.* Not surprisingly, the Court's rejection of each of those suits emphasized the fundamental character of the case as involving the vindication of purely private grievances.

Thus, *Blatchford* pointed out that even if the plan of the convention contemplated that the United States would have the power to sue States “for the benefit of private parties,” it would not follow that those parties could sue a State themselves. *Blatchford*, 501 U.S. at 785 (“even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself”). Similarly, in *Alden*, the Court noted that, unlike suits brought by the employees themselves pursuant to a “broad delegation” by Congress of authority to sue nonconsenting States, “[s]uits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State.” 119 S. Ct. at 2267. In other words, “[t]he difference between a suit by the United States *on behalf of the employees* and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State.” *Id.* at 2269 (emphasis added).

Because both *Blatchford* and *Alden* addressed only the United States' authority *to vindicate the interests of private parties* through litigation against States, “[t]he language in [those] opinion[s] upon which [Vermont] relies cannot be taken as a decision upon a point which the facts of th[ose] case[s] did not present” (*United States v. Neifert-White Co.*, 390 U.S. 228, 231 (1968))—*i.e.*, whether the United States may recover damages from States that fraudulently obtain federal property only if the government's claim is personally and actively prosecuted by Executive Branch officials. In fact, the real-party-in-interest authorities that Vermont omits

from its brief fully explain the Court's insistence on Executive Branch involvement when litigation is brought by the United States for the apparent benefit of private parties. That involvement, in furtherance of legislatively declared federal policies, provides a necessary assurance that the interests of the United States are actually at stake in litigation that otherwise would be suspect as purely private under *New Hampshire*.⁵

⁵ The Court resolved a variant of that issue in *United States v. Minnesota*, 270 U.S. 181 (1926), a case that *Blatchford* distinguished. See 501 U.S. at 783. In *Minnesota*, federal officials brought suit against Minnesota, in the name of the United States, to enforce the rights of Indian tribes to certain land. It was alleged that federal land officers had issued land patents to the State unlawfully, in disregard of the applicable statute and of tribal treaty rights. *Minnesota*, 270 U.S. at 192-93. The State defended on the ground that a suit by individual Indians would violate the Eleventh Amendment (*id.* at 194-95), and "that the United States [was] only a nominal party—a mere conduit through which the Indians are asserting their private rights." *Id.* at 193. Although this Court readily "conceded" that it could not entertain the suit "if the Indians [were] the real parties in interest and the United States only a nominal party," *ibid.* (citing, *inter alia*, *New Hampshire* and *Hans*), it nonetheless concluded that the United States "ha[d] a real and direct interest" in the controversy because it had a "sovereign" interest in fulfilling its treaty and other obligations. *Id.* at 194. As the Court noted, it is a "duty" of government to fulfill "an obligation incurred by it . . . which personal litigation could not remedy." *Id.* at 195. In other words, the suit's obvious benefit to private parties notwithstanding, the suit was not barred by *New Hampshire* because the circumstances indicated that the government was in fact pursuing its own, sovereign policy objectives.

Alden and *Blatchford* belong to the class of cases in which this Court has recognized that the United States (and the States) may properly engage in litigation that appears to benefit identifiable private parties when such litigation serves larger governmental goals. See *North Dakota v. Minnesota*, 263 U.S. 365, 375-76 (1923) (notwithstanding *New Hampshire*, one State can sue another "to protect the general comfort, health or property rights of its inhabitants"). Such suits—some of which this Court has analyzed under the rubric of "*parens patriae*"—are permissible when the government "is not merely litigating as a volunteer the personal claims of its citizens" but instead establishes that "sovereign or quasi-sovereign interests are implicated." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (*per curiam*); see also *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600-01 (1982). Although "neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract," *Alfred L. Snapp & Son*, 458 U.S. at 607, the Court over time has emphasized such considerations as the subject matter of the suit (*e.g.*, general health and well-being of the citizenry) and the government's ability "to address [the asserted injury] through its [own] sovereign law-making powers." *Id.* at 607.

Examining whether Executive Branch officials take affirmative steps to prosecute a suit that primarily appears to benefit private parties, as was suggested in *Blatchford* and *Alden*, is best understood as a way of assuring that the United States is a real party in interest in such cases, and of foreclosing suits that merely "redress private grievances." *Pennsylvania*, 426 U.S. at 665. Indeed, that is the clear implication of *Alden*, which expressly stressed the need to be sure that the interests of the Nation are truly implicated when a suit benefits particular employees. *Alden*, 119 S. Ct. at 2269. When the only apparent injury was suffered by a private party, and the recovery will inure solely to him,

Executive Branch participation provides a basis for concluding that federal interests—such as generalized deterrence or securing favorable interpretations of federal statutes for programmatic reasons—are actually at stake in the litigation.

That need to make sure that the interests to be vindicated in the suit are indeed sovereign or quasi-sovereign has little bearing in cases like this one, which involves a cause of action that manifestly belongs to the United States. Because this case, unlike *Alden* and *Blatchford*, inherently implicates the United States' property interests, Vermont's nearly complete reliance on those cases is entirely misplaced.

C. The United States Is The Real Party In Interest In *Qui Tam* Suits Under The Act

The court of appeals correctly determined that the United States is the real party in interest in *qui tam* suits brought under the Act, because such suits plainly redress injuries to the property rights of the United States. It is particularly appropriate to conclude that Congress may vindicate those interests through *qui tam* suits, because similar informer statutes were frequently enacted by the early congresses.

1. While contesting (albeit erroneously) the relevance of the inquiry, Vermont scarcely disputes that the United States is the real party in interest in litigation brought under the Act, nor could it. Under the plain terms of the Act, suit *must* be brought in the name of the government, and the essence of the case is the defendant's fraudulent procurement of government property—an injury to the United States Treasury that the government undoubtedly is entitled to remedy by legal action. That injury to the fisc provides the measure for any damages that may be assessed, and, when recovered, the bulk of those damages must be paid over to the federal treasury. Indeed, as the court of appeals observed, "if there has been no injury to the United States, the *qui tam* plaintiff cannot

recover." Pet. App. 17. And, of course, the United States may not seek a "dual recovery on the same claim or claims"—because the United States is the real party in interest, "if the Government declines to intervene in a *qui tam* action, it is estopped from pursuing the same action administratively or in a separate judicial action." S. REP. 345, at 27; see *In re Schimmels*, 127 F.3d 875, 881-84 (9th Cir. 1997) (government is bound by prior adjudication against relator).

Vermont darkly suggests that Congress might use *qui tam* remedies broadly to circumvent recent rulings by this Court that deny Congress the power to abrogate a State's immunity under Article I of the Constitution. Vt. Br. 32-33. But that alarmist rhetoric is unjustifiable and misleading: what is at issue here is whether Congress may authorize *qui tam* litigation against States *when the United States is the real party in interest*, not whether Congress may invoke the *qui tam* vehicle to permit the vindication of purely private grievances that it might make actionable under Article I. Indeed, Vermont's arguments overlook the fact that the False Claims Act was enacted "broadly to protect the funds and property of the Government" (*Rainwater*, 356 U.S. at 592), and thus is based on the Property Clause of Article IV of the Constitution, U.S. Const. art. IV, § 3, cl. 2, rather than solely on Article I.

The Property Clause gives Congress the "power to dispose of and make all needful Rules and Regulations respecting * * * Property belonging to the United States." It goes on expressly to provide that "nothing" in the original Constitution "shall be so construed as to Prejudice any Claims of the United States * * *." U.S. Const. art. IV, § 3, cl. 2. This Court repeatedly has held that Congress' power to protect the property of the United States is "plenary," *Utah Div. of State Lands v. United States*, 482 U.S. 193, 201 (1987); *Ruddy v. Rossi*, 248 U.S. 104, 106 (1918), and "sub-

ject to no limitations." *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871). Moreover, because "Congress has the absolute right to prescribe the times, the conditions and the mode of transferring" federal property (*id.*), it "can prohibit absolutely or fix the terms on which its property may be used." *Light v. United States*, 220 U.S. 523, 536 (1911). Neither Vermont nor any other State "can interfere with this right or embarrass its exercise." *Gibson*, 80 U.S. (13 Wall.) at 99; *Van Brocklin v. Tennessee*, 117 U.S. 151, 168 (1886). Thus, the exercise of congressional authority under the Property Clause inherently disallows "apprehension of any encroachments upon state rights." *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840).⁶

The breadth of Congress' authority to provide for the protection of federal property, and to vindicate the claims of the United States against those who convert such property or obtain it fraudulently, cannot be doubted. Indeed, because the Property Clause expressly forecloses any interpretation of the original Constitution that might prejudice the United States'

⁶ Although the bulk of this Court's cases concerning the Property Clause address congressional power over public lands, the Clause by its terms applies to any "other Property belonging to the United States." As the Court noted in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), "[t]he grant was made in broad terms, and the power of regulation and disposition was not confined to territory * * * so that the power may be applied, as [Justice] Story says, 'to the due regulation of all other personal and real property rightfully belonging to the United States.' And so, he adds, 'it has been constantly understood and acted upon.'" *Id.* at 331 (quoting STORY ON THE CONSTITUTION §§ 1325, 1326); see also *Gratiot*, 39 U.S. (14 Pet.) at 536-37 (Congress' power over property is "the same" as over lands); *Van Brocklin*, 117 U.S. at 168 (same).

ability to vindicate its "Claims," it is difficult to see how the Eleventh Amendment can stand as an obstacle to the accomplishment of the means chosen by Congress in the False Claims Act to secure that end. After all, it is now settled that the Eleventh Amendment did not "change" the constitutional plan devised by the Framers, but merely "restore[d] the original constitutional design." *Alden*, 119 S. Ct. at 2251. By the express terms of the Constitution, the authority of Congress under Article IV to prescribe the conditions under which federal property is available to States—and the terms under which federal "Claims" against States for the misuse of such property will be prosecuted in federal court—are not powers cabined by the text of the Constitution itself, much less by an immunity for States that is implicit in the original constitutional plan.

2. The fact that Congress chose to protect federal property rights through *qui tam* litigation supports the appropriateness of Congress' exercise of its Article IV power here, because *qui tam* suits have a long-standing pedigree. "Statutes providing for actions by a common informer, who himself has no interest in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *Marvin v. Trout*, 199 U.S. 212, 225 (1905); see also *United States ex rel. Marcus*, 317 U.S. at 541, n.4 (same). Indeed, such *qui tam* actions are among the oldest forms of action known to the common law. See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (1768); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 265 (1972 ed.).

American colonial legislatures not only adopted English *qui tam* statutes but also drafted new laws containing *qui tam* provisions based on the English model, creating a system in early America that was "virtually identical" to the English

system. See Note, *The History and Development of Qui Tam*, 1972 WASH. U.L.Q. 81, 97. Thus, *qui tam* actions had "entered American law through the general introduction of British statutory law at the time independence was declared." JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-8 (1999). Those early American statutes adhered to Blackstone's formulation, generally giving half of the recovery to the informer and half to the government. See Dan D. Pitzer, Comment, *Qui Tam: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 TEX. INT'L L. J. 415, 417 (1972).

In addition to *qui tam* statutes enacted by state legislatures, the federal government engaged in the "widespread early congressional creation of the *qui tam* action." Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 175 (1992). The First Congress alone enacted at least a dozen statutes that expressly authorized an informer to share in a portion of the authorized recovery.⁷ Similar provisions were

⁷ See Act of July 31, 1789, ch. 5, § 8, 1 Stat. 29, 38, 44-45, 48 (import duties); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (vessel registration); Act of March 1, 1790, ch. 2, § 3, 6, 1 Stat. 101, 102-03 (census); Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25 (copyright infringement; recovery of the moiety by the injured author); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (sea regulations); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (regulation of trade with Indian tribes); Act of Aug. 4, 1790, ch. 35, §§ 55, 69, 1 Stat. 145, 173, 177 (import duties); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195-96 (Bank of the United States); Act of March 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (duties on liquor); see also Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 (regulation of Treasury officers); Act of March 3, 1791, ch. 8, § 1, 1 Stat. 215 (extension of same); Act of July 5, 1790, ch. 25,

contained in acts passed by the Second, Third, and Fourth Congresses.⁸ Like the actions of the early congresses, the decisions of this Court during the infancy of our Constitution demonstrate that *qui tam* actions were viewed as a lawful and proper means of advancing sovereign interests. Soon after the Constitution was adopted, for example, the Court held that statutes that provide a reward to an informer will be construed to authorize a *qui tam* suit by him even if that cause of action does not expressly appear in the statute. *United States ex rel. Marcus*, 317 U.S. at 537 n.4 (citing *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805)). And one of the earliest and most celebrated landmarks in this Court's jurisprudence of federal-state relations—*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)—"was a *qui tam*

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§ 1, 1 Stat. 129 (extending provisions of the census Act of March 1, 1790, *supra*, to Rhode Island).

⁸ The Second Congress, for example, enacted informer provisions in statutes governing the postal service, while extending *qui tam* enforcement of laws regulating trade with Indian tribes. See Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 239 (postal service); Act of March 1, 1793, ch. 19, § 12, 1 Stat. 329, 331 (regulation of trade with Indian tribes). Among statutes enacted by the Third Congress, similar provisions appeared in the Neutrality Act, see Act of June 5, 1794, ch. 50, § 3, 1 Stat. 381, 383, and in many provisions dealing with the collection of duties. See, e.g., Act of June 5, 1794, ch. 48, § 5, 1 Stat. 376, 378; see also Act of June 9, 1794, ch. 65, § 12, 1 Stat. 397, 400; Act of June 5, 1794, ch. 45, § 10, 1 Stat. 373, 375; Act of June 5, 1794, ch. 51, § 21, 1 Stat. 384, 389. The Fourth Congress extended earlier statutes regulating trade with Indian tribes, see Act of May 19, 1796, ch. 30, § 18, and provided that the government's decision to mitigate a fine or forfeiture would not affect an informer's interest in his moiety. Act of March 3, 1797, ch. 13, § 3, 1 Stat. 506, 506-07.

action, brought to recover a penalty." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 537 (1832).

Because "early congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning" (*Printz v. United States*, 521 U.S. 898, 905 (1997) (internal quotations and brackets omitted)), the fact that Congress so extensively relied on informer statutes to protect the federal fisc and further federal regulatory policies "when the founders of our government and framers of our Constitution were actively participating in public affairs" (*Knowlton v. Moore*, 178 U.S. 41, 56 (1900)) "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936); see also *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986); *Myers v. United States*, 272 U.S. 52, 175 (1926); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) ("[i]t is a contemporary interpretation of the most forcible nature"). Of particular relevance here, the prevalence of informer statutes at the founding provides powerful evidence that the Framers well understood that the United States might rely on *qui tam* actions to vindicate its rights. Because the "plan of the Convention" necessarily subjects States to suit by the United States (*Alden*, 119 S. Ct. at 2267), compelling proof would be needed to show that the Framers somehow intended to preclude the United States from relying on that traditional form of action in protecting its rights against state interference—especially where, as here, Congress does so to protect federal property from fraud. Vermont provides no such evidence.⁹

⁹ *Amici* Regents of the University of Minnesota *et al.* contend that this Court's decision in *United States v. Peters*, 3 U.S. (3 Dallas) 121 (1795), somehow establishes that *qui tam* suits may

3. Finally, Vermont suggests that even if the United States is a real party in interest, and therefore properly viewed as the plaintiff in this action, Mr. Stevens is an *additional* party whose participation in the suit is barred by Vermont's sovereign immunity. According to Vermont, that conclusion follows from the fact that a *qui tam* plaintiff under the Act brings suit "for [himself] and for the United States Government," 31 U.S.C. § 3730(b), and from this Court's purported holding in *Pennhurst II* that the United States' presence as a plaintiff never eliminates a State's immunity with respect to a "co-plaintiff." Vt. Br. 40-41, 46-47. Neither objection is sound.

[Footnote continued from previous page]

not be maintained against States. No State was even remotely a party to the case, however, and *amici* concede that *Peters* was not a *qui tam* action—it was a libel filed for various alleged torts committed on the high seas by a ship owned by the Republic of France. In fact, even on their own terms, *amici*'s claims are strained to the point of absurdity: the contention is that counsel for the French ship's captain mentioned the then-proposed Eleventh Amendment by way of analogy during his *argument*, and that the facts of the case might support a *qui tam* action, which had indeed separately been filed. This Court did not "broadly accept[]" all of counsel's arguments, as alleged by *amici* (Minn. Br. 8-9); it issued a three-line opinion stating that Members of the Court held differing views on the issues, but that a majority was of the view that a writ of prohibition should issue. 3 U.S. (3 Dallas) at 129. The recitals to that writ cited, as support for the prohibition, the law of nations and our treaties with the French. *Id.* at 129-30. *L'Invincible*, 14 U.S. (1 Wheat.) 238, 259-60 (1816), also relied on by *amici* as reaffirming the supposed holding of *Peters*, stated only that the recitals to the writ issued in *Peters* correctly stated the law applicable to alleged war prizes.

Vermont's reliance on the Act's description of a *qui tam* suit as an action brought by a person both for himself and for the government advances the analysis very little. The statutory language merely mirrors the phraseology used at common law to denote that an action is brought by the plaintiff as a *qui tam* relator. Compare *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 317 ("John James, who sued as well for himself as for the state of Maryland"). Like other terms of art used by Congress, the phrase bears only the meaning given it by the accumulated tradition that it invokes. *Morissette v. United States*, 342 U.S. 246, 263 (1952); *Bell v. United States*, 462 U.S. 356, 360 (1983). Nothing in the common law tradition suggests that a relator's suit redresses any injury other than that suffered by the sovereign as a result of the defendant's violation of the pertinent statutory norms.¹⁰ Indeed, the relator sues "for himself" only in the sense that he may receive, as a reward, part of the sovereign's recovery. Because the relator does not have a personal cause of action against a *qui tam* defendant, it is error to view him as a "co-plaintiff" in the sense suggested by Vermont.

In any event, Vermont's reading of *Pennhurst II* is itself erroneous, and thus Vermont's claim must fail even if a *qui tam* relator properly is characterized as a "co-plaintiff." The question this Court considered in *Pennhurst II* was whether the Eleventh Amendment barred monetary suits against a State for violations of *state* law. One of the arguments advanced by the plaintiffs was that the United States was

¹⁰ Because Mr. Stevens has not sued the State on the basis of the adverse employment action taken against him by his employer, the Court need not consider in this case whether a different analysis would apply to a claim brought under the Act's anti-retaliation provision, 31 U.S.C. § 3730(h).

already a plaintiff in the case, having sued the State for violations of *federal* law. This Court ruled that the United States' participation did not authorize the private parties to assert their own *additional* claims under state law. "[T]he United States does not have standing to assert the state-law claims of third parties," the Court observed, and therefore "the applicability of the Eleventh Amendment to respondents' state-law claim is unaffected by the United States' participation in the case." *Pennhurst II*, 465 U.S. at 103 n.12.

Pennhurst II did not address the situation that, on Vermont's view of the statute, is presented here: a case in which the United States and a private party are "co-plaintiffs" on the same federal-law claim. In fact, *Arizona v. California*, 460 U.S. 605 (1983), a case raising those facts but not cited by Vermont, rejects Vermont's argument. In that case, the United States brought water claims against several States on behalf of certain Indian tribes. The tribes sought to intervene, but the defendant States objected to the tribes' intervention on the basis of the Eleventh Amendment. This Court squarely rejected the States' Eleventh Amendment claim, explaining that "the tribes do not seek to bring new claims or issues against the States" and "[t]herefore our judicial power over the controversy is not enlarged by granting leave to intervene." *Id.* at 614. Thus, even on Vermont's view that Mr. Stevens should be considered a "co-plaintiff" of the United States in this case, his presence in that purported role does not expand the claims before the Court and, therefore, "the State['s] sovereign immunity protected by the Eleventh Amendment is not compromised." *Ibid.*

D. The False Claims Act Satisfies Any Requirement For Executive Branch Control That This Court Reasonably Might Impose

Even if the Eleventh Amendment in fact invariably required Executive Branch participation in government suits

against States, as alleged by Vermont, the Attorney General's power under the Act to control *qui tam* litigation surely would meet any standard for such participation that this Court reasonably might impose.

1. The Act expressly requires a relator to provide the Attorney General, when the complaint is filed, with a "written disclosure of substantially all material evidence and information the [relator] possesses * * *." 31 U.S.C. § 3730(b)(2). On the basis of that information and of her own "diligent[]" investigation of the allegations supporting the complaint (*id.* §§ 3730(a), 3730(b)(2)), the Attorney General must make an affirmative decision whether to take over the prosecution of the case. That means, as the court of appeals noted, that she is authorized to intervene at the outset, take control of the case, and compromise it or end it for any legitimate governmental purpose "notwithstanding the *qui tam* plaintiff's desire that it continue." Pet. App. 17. In effect, the statute allows the Attorney General to leverage her resources by permitting the continuation of fraud cases that she might not otherwise have the ability to prosecute, despite their potential for redressing an injury to the public fisc.

The Act also provides the Attorney General the means for keeping abreast of later developments in the litigation, such as evidence that might "escalate the magnitude or complexity of the fraud * * * or [that otherwise] make[] it difficult for the *qui tam* relator to litigate alone," so that she may elect to intervene at a later time. S. REP. 345, at 26-27. Although Vermont stresses that such later intervention by the Attorney General does not "limit[] the status and rights" of the relator under the Act (Vt. Br. 43, quoting 31 U.S.C. § 3730(c)(3)), the State is wrong to contend that that provision denies the Attorney General "authoritative control over the litigation." *Ibid.* Congress contemplated that even intervention at a later stage of the case would still "allow the Gov-

ernment to take over the suit." S. REP. 345, at 27. Indeed, if there were any doubt on that score it would be rather odd to construe the statutory language, as Vermont urges, more broadly than its text fairly requires solely to bolster Vermont's challenge to the Act's constitutionality.¹¹

2. Vermont contends, however, that States somehow will lose a fundamental safeguard of federalism unless this Court requires Executive Branch officials to conduct personally all litigation by the United States against a State of the Union. According to Vermont, *qui tam* suits under the Act "deprive[] Vermont of the affirmative discretion exercised by federal officers in their enforcement of federal laws," prevent States from seeking the intercession of their congressional delegation in persuading Executive Branch officials not to prosecute, and generally "allow[] the United States to remove itself from political accountability." Vt. Br. 37-38. Those claims are meritless.

¹¹ The language on which Vermont relies is most naturally read as making clear that later intervention does not divest the relator of his share of any eventual recovery or of the limited right to participate in the action that he would have enjoyed had the Attorney General intervened at the outset. Indeed, because the Attorney General ordinarily is presumed to have the right to control all litigation in which the United States is a party, to the exclusion even of counsel for other government departments, see *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278-82 (1888); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1868); *The Gray Jacket*, 72 U.S. (5 Wall.) 370, 371 (1866), stronger language than that relied on by Vermont would be necessary to conclude that the Attorney General does not have the ultimate authority to speak for the United States in litigation conducted under a statute that specifically gives her the right to intervene.

Vermont cites no authority, apart from its indefensibly broad reading of *Blatchford* and *Alden*, for the proposition that States invariably are entitled to an exercise of "discretion" by Executive Branch officials as a condition to suit. Moreover, Vermont is simply wrong in asserting that the False Claims Act forecloses that "discretion," relieves the Attorney General from accountability, or somehow disables a State's congressional delegation from interceding with the Executive Branch.

Because the Attorney General has the statutory right to intervene and terminate a *qui tam* suit, she remains accountable for the litigation. The paradoxical premise of Vermont's argument is that, while Executive Branch officials *alone* are empowered by our Constitution to make the sensitive litigation judgments that might be required by federal-state conflicts, the Attorney General will cravenly rely on the fact that a suit was filed by a relator (rather than a federal prosecutor) to look the other way, shirk her duties, and escape political accountability. *E.g.*, Vt. Br. 38. Although Vermont's own acts (as detailed in the Complaint and Written Disclosure) persuasively demonstrate that public officers on occasion engage in reprehensible conduct, it hardly needs saying that this Court, in framing rules of law, ordinarily proceeds on the opposite assumption—*i.e.*, that public officers will "properly discharge[] their official duties." *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); *see also United States v. Mezzanatto*, 513 U.S. 196, 210 (1995). Indeed, Vermont's argument rings particularly hollow in this case, where the Attorney General has affirmatively opposed Vermont's arguments in every court to which Vermont has presented them.

Moreover, invoking the *qui tam* provisions of the Act in suits against States scarcely diminishes the value of States' congressional representation. A State's congressional dele-

gation can make as effective an argument for dismissal in this context as it can in any run-of-the-mine case in which a federal prosecutor has brought suit, in the name of the United States, against a State of the Union. Moreover, Vermont retains the key procedural safeguard that congressional representation affords States in the federal system: Vermont can seek the enactment of federal *legislation* that fully implements Vermont's jaundiced view of *qui tam* litigation. *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988). That safeguard is more than sufficient to protect the general federalism concerns asserted by Vermont here, at least absent some "extraordinary defect[] in the national political process" that somehow has deprived Vermont "of its right to participate" in the process of framing federal legislation. *Baker*, 485 U.S. at 512. In fact, if this Court were to credit Vermont's and its *amici*'s assertions about the patent unwisdom of subjecting States to *qui tam* liability, it would also have to conclude that Vermont and her sister States will encounter little difficulty in enlisting their respective congressional delegations to dispense with such liability entirely.

II. STATES OF THE UNION ARE "PERSONS" THAT MAY SUE AND BE SUED UNDER THE ACT

A. Because The Court Of Appeals Lacked Jurisdiction Over Vermont's Statutory Arguments, This Court May Not Consider Them

While the court of appeals correctly reviewed Vermont's Eleventh Amendment claim, that court's assertion of "pendent appellate jurisdiction" over the statutory issue cannot be reconciled with *Swint v. Chambers County Comm'n*, 514

U.S. 35, 49-50 (1995).¹² *Swint* held that courts of appeals lack discretion "to append to an * * * appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court." 514 U.S. at 47.¹³ Although the Solicitor General correctly noted at the certiorari stage that *Swint* left open the possibility that courts of appeals may have jurisdiction to review an otherwise non-appealable ruling that is "inextricably intertwined" with a properly appealable interlocutory order, or that must be decided to ensure "meaningful review" of the issue properly before the court (U.S. Pet. Br. at 10 n.5 (May 26, 1999)),

¹² Vermont's interlocutory appeal of the denial of its motion to dismiss on Eleventh Amendment grounds falls within the narrow class of exceptions to the final judgment rule recognized in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). See *Metcalf & Eddy, Inc.*, 506 U.S. at 147. States may appeal such orders immediately because the immunity from suit conferred by the Eleventh Amendment "is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 144. The State's statutory claim, however, is a defense to *liability*, not an immunity from suit, and it may be asserted by the State on appeal from a final judgment.

¹³ The Court reasoned that the statutory scheme of 28 U.S.C. §§ 1292(a)-(b) contemplates that *district courts* have "first line discretion" (514 U.S. at 47), to determine which orders not enumerated in 28 U.S.C. § 1291 or otherwise appealable under *Cohen*, *supra*, are appropriate for interlocutory review; that the Rules Enabling Act empowers the Court to expand the list of orders appealable on an interlocutory basis only through the rulemaking process of 28 U.S.C. § 2072 and not through judicial decision; and that "loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 49-50.

those circumstances do not justify review of the statutory issue pressed by Vermont here.

The Eleventh Amendment issue is not "inextricably intertwined" with the statutory question decided by the court of appeals, because that court could fully determine the constitutional issue on the assumption that States are "persons" under the False Claims Act. Indeed, this Court has followed precisely that course in the past. In *Edelman v. Jordan*, 415 U.S. 651 (1974), for example, the Court adjudicated the scope of a State's Eleventh Amendment immunity without addressing whether States are "persons" under 42 U.S.C. § 1983, an issue that the Court only decided fifteen years later. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989). Moreover, the Eleventh Amendment question is not coterminous with the statutory question, nor does it subsume it. To the contrary, the statutory question is far broader: *the State's arguments on that question, if accepted, would preclude even suits brought by the Attorney General, who concededly is not bound by the constitutional immunity that justified Vermont's interlocutory appeal in the first place.*

The Solicitor General has suggested that the court of appeals may have properly reviewed the statutory question because "accepted principles of constitutional adjudication" require this Court to decide the "logically antecedent" statutory issue before the constitutional one. U.S. Pet. Br. at 10 n.5. That approach, however, begs the question of jurisdiction. While this Court has long adhered to a "policy of avoiding the unnecessary adjudication of federal constitutional questions," *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1981) (emphasis added); see also *United States v. National Treasury Emp. Union*, 513 U.S. 454, 477 (1995), that prudential doctrine presupposes that the Court *has* jurisdiction to review both the constitutional and non-

constitutional grounds of decision. The doctrine does not itself confer jurisdiction on an appellate court to decide an issue not otherwise before it. Indeed, it is, to say the least, anomalous to assert "pendent" jurisdiction over a question, not otherwise before the Court, for the sole purpose of avoiding, if possible, decision of the only issue subject to interlocutory review. In sum, there is no substantial basis on which to conclude that Vermont's statutory challenge was properly before the court of appeals or can be addressed by this Court.

B. No Canon of Construction Requires This Court To Presume That States Are Not Persons Under The Act

Were this Court to reach the statutory question presented by Vermont, it would have to reject Vermont's interpretation of the Act. Vermont's position flows almost entirely from its contention that *Will* establishes that "the plain meaning" of the word person "excludes" States unless Congress uses a "plain statement" to refer to them by name. Vt. Br. 11-12, 18. Vermont is wrong both in its reading of *Will* and in supposing that any "plain statement" canon applies here.

1. *Will* did not "adopt a *per se* rule prohibiting the interpretation of general liability language to include the States, absent a clear statement by Congress to the effect that Congress intends to subject the States to the cause of action." *Hilton v. South Carolina Public Rys. Comm'n*, 502 U.S. 197, 205 (1991). As this Court repeatedly has ruled—both before and after its decision in *Will*—"there is no hard and fast rule of exclusion' of the sovereign." *Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 83 (1991) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941)). Not surprisingly, this Court "many times has * * * held that the United States or a state is a 'person' within the meaning of statutory provisions applying

only to persons." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 91-92 (1934); see also *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 154-55 (1983); *Ohio v. Helvering*, 292 U.S. 360, 371 (1934).

Instead, *Will* simply "appl[ie]d an 'ordinary rule of statutory construction,'" *Hilton*, 502 U.S. at 205 (quoting *Will*, 491 U.S. at 65), that operates "'where statutory intent is ambiguous.'" *Id.* at 206 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991)). In those circumstances, "[s]ince, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." *United States v. Cooper Corp.*, 312 U.S. at 604. The principle on which Vermont relies, in other words, is a tie-breaker that comes into operation at the *end* of the process of construction, not, as Vermont would have it, a rule of law that States are not "persons" unless Congress invokes explicit language of inclusion. See *Salinas v. United States*, 522 U.S. 52, 60 (1997) ("the rules of statutory construction we have followed to give proper respect to the federal-state balance * * * d[o] not apply when a statute [is] unambiguous. A statute can be unambiguous without addressing every interpretive theory offered by a party" (internal citations omitted)).¹⁴

¹⁴ Vermont's invocation of the doctrine of constitutional "doubt" (Vt. Br. 16-17) fails for much the same reason. That canon may be applied only to embrace a statutory reading "not plainly contrary to the intent of Congress," *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994), and thus can have no operation where, as here, the statute unambiguously reaches the challenged conduct. In any event, even if there were some doubt about the constitutionality of a particular application of the Act (*i.e.*, suits by *qui tam* relators), that doubt would scarcely justify the statutory construction urged by Vermont, which would have the primary

2. In any event, that tie-breaking canon would have no bearing in this case even if Vermont could establish that the Act is ambiguous, because the Act makes "person[s]" liable *to the United States* for fraud against the federal government. Under Vermont's statutory theory, the Attorney General herself could not have brought suit against Vermont. Neither Vermont nor its *amici*, however, have cited a single case from this Court that applies *Will's* rule of statutory construction where, as here, a federal statute grants a right of action *to the United States*. In fact, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), concluded that States were "persons" suable under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*, based in part on the Court's express *rejection* of such a proposition. As the Court noted, "the Constitution presents no barrier to lawsuits brought by the United States against a State" and "[f]or purposes of such lawsuits, States are naturally just like 'any nongovernmental entity.'" *Id.* at 11. Accordingly, "there are no special rules dictating when they may be sued by the Federal Government, nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits." *Ibid.*¹⁵

[Footnote continued from previous page]

effect of foreclosing suits brought by the Attorney General on behalf of the United States that are not open to any conceivable constitutional objection.

¹⁵ Although the Court subsequently repudiated the constitutional holding of *Union Gas* in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court never has wavered from the statutory analysis that commanded a majority of the Court in *Union Gas*. As the Court noted in *Union Gas*, a rule exempting States from suits by the United States, save where Congress expressly names States as

The Court's refusal to apply any "stringent interpretive principle" (*Union Gas*, 491 U.S. at 11) to federal statutes that authorize suits by the United States in no way denigrates "the systemic importance of the federal balance." *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 827 (1997). It simply recognizes that in cases in which the United States is a plaintiff "the other side of the federal balance must be considered," because "[i]n our constitutional system the National Government has sovereign interests of its own." *Id.* As this Court explained in *Block v. North Dakota*, 461 U.S. 273 (1983), "[t]he judicially created rule that a sovereign is normally exempt from the operation of a generally worded statute * * * serves the public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers." *Id.* at 290. Because that "judge-created rule [is] designed to protect the interests of the citizens of one particular State," it "must yield in the face of * * * evidence that Congress has determined that the national interest requires a contrary rule." *Ibid.*

[Footnote continued from previous page]

parties defendant, would effectively repudiate the traditional rule "that *no* explicit statutory authorization is necessary before the Federal Government may sue a State." *Union Gas*, 491 U.S. at 11 (citing *United States v. California*, 332 U.S. 19, 26-28 (1947)); see also *West Virginia*, 479 U.S. at 311-12. Indeed, Justice Scalia fully joined the part of the Court's opinion in *Union Gas* that embraced that statutory analysis—and which rejected the interpretive methodology urged by Vermont here—while dissenting from the Court's Eleventh Amendment holding and later joining the *Seminole Tribe* majority in overruling that holding.

C. The Act Unambiguously Applies To States Of The Union

To the extent Vermont and its *amici* even attempt to address whether Congress intended to make States suable under the Act by using traditional "aids to construction," *Cooper Corp.*, 312 U.S. at 604-05; *Primate Protection League*, 500 U.S. at 83, their arguments are almost entirely misdirected. According to Vermont and its *amici*, the controlling question is whether Congress intended to subject States to suit in 1863. In 1986, however, Congress *repealed* the entire paragraph that formerly defined the scope of the Act and enacted, in its place, language that applies the Act's proscriptions to "[a]ny person." See False Claims Amendments Act of 1986, Pub. L. 99-562, 100 Stat. 3153, 3153.¹⁶

¹⁶ Before 1986, the language preceding paragraph (1) of Section 3729 read:

A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of \$2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person—

31 U.S.C. § 3729 (1982). The Act then went on to enumerate the prohibited conduct in paragraphs (1) through (6). In 1986 Congress entirely *deleted* that introductory paragraph and enacted new charging language:

Section 3729 of Title 31, United States Code, is amended— (1) by striking the matter preceding paragraph (1) and inserting the following: "(a) LIABILITY FOR CERTAIN ACTS. —Any person who—"

False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, 3153 (emphasis added).

Moreover, Congress made other changes to the text of the Act that unambiguously establish its intent to subject the States to suit. And Congress *also* expressly stated that intent in the relevant Committee Report. Vermont's statutory argument to the contrary is simply untenable.

1. Three distinct aspects of the statutory text squarely demonstrate that Congress clearly intended that the Act apply to the States. *First*, the Act reaches "[a]ny person" without qualification. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)); see also *Brogan v. United States*, 118 S. Ct. 805, 808 (1998) (statute that criminalizes "any" false statement reaches "a false statement 'of whatever kind'"). Because the term "any" imports "no restriction" (*United States v. Turkette*, 452 U.S. 576, 580 (1981)) or "limit[ation]" (*International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974)), it "leaves no doubt as to the Congressional intention to include all" members of the category identified by the enactment. *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945). And since States *can* be "persons" suable under federal statutes, see, e.g., *Sims v. United States*, 359 U.S. 108, 112-13 (1959); *Georgia v. Evans*, 316 U.S. 159, 161 (1942), Congress' use of the expansive term "any" necessarily manifested its intent to reach States among the "person[s]" that might be subjected to suit.

Second, the 1986 enactment included a provision authorizing the Attorney General to issue "civil investigative demands" (CIDs) when she conducts "false claim law investigations." 31 U.S.C. § 3733(a). The CID provisions define a "false claims law investigation" as an inquiry con-

ducted "for the purpose of ascertaining whether *any person* is or has been engaged in any violation of a false claims law," *id.* § 3733(l)(2), and expressly include the provisions of the Act that are at issue here ("sections 3729 through 3732") as "false claims laws" subject to such investigation. *Id.* § 3733(l)(1)(A). Because the CID provisions also expressly define "person" to include "any State or political subdivision of a State" (*id.* § 3733(l)(4)), the conclusion is inescapable that States are "persons" under Section 3729—else there would be little point in authorizing the Attorney General to investigate whether a State "is or has been engaged in any violation" of that section.

Vermont objects, however, that the definitions in Section 3733(l) apply only "for purposes of" the CID provisions. It contends that those definitions therefore bespeak an intent to exclude States from other parts of the Act, since "[i]f the term 'person' as used in the FCA already included the States, this added definition would have been unnecessary." Vt. Br. 20-21. That argument overlooks the fact that the CID provisions do not merely define "person" to include States, but also expressly refer to Section 3729 as one of the laws that such "person[s]" may "violat[e]." Moreover, the definition of "person" in the CID provisions includes not only States, but also "any natural person, partnership, corporation, association, or other legal entity." 31 U.S.C. § 3733(l)(4). Under Vermont's interpretive theory, therefore, Section 3729 would apply to *no one*. There is no reason for this Court to accept such an absurd interpretation of the Act. *See, e.g., Citizens Bank v. Strumpf*, 516 U.S. 16, 20 (1995) ("[i]t is an elementary rule of construction that the act cannot be held to destroy itself") (internal quotation marks and citation omitted).

Third, Vermont does not seriously dispute that States are "persons" that can initiate *qui tam* proceedings as plaintiffs

under the Act, nor could it. Before the 1986 enactment, the National Association of Attorneys General "strongly urge[d]" Congress to remove impediments that had been fashioned by lower courts to such suits (S. REP. 345, at 13), and Congress responded by, *inter alia*, amending the Act to permit "State and local governments to join State law actions with False Claims Act actions brought in Federal district court * * *." *Id.* at 16; *see* 31 U.S.C. § 3732(b). "Since there is a presumption that a given term is used to mean the same thing throughout a statute," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and Section 3730 uses the term "person" to refer both to *qui tam* relators and to potential defendants, "it is virtually impossible" (*ibid.*) to read the Act to say that States are persons in the former sense but not in the latter. While Vermont stresses that this canon of interpretation is "not rigid" (Vt. Br. 24), the State offers nothing to counteract the force of that canon here.

2. The plain-language interpretation of the Act is fully consistent with the Act's broad remedial purposes. This Court has long recognized that the Act "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *Niefert-White*, 390 U.S. at 232. Indeed, more than 50 years ago, this Court held that the Act covers contractors who defraud State agencies out of federal grant monies, since "Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to the states." *United States ex rel. Marcus*, 317 U.S. at 544. As the Court noted, grants in aid to the States "are as much in need of protection from fraudulent claims as any other federal money." *Ibid.*

Whatever ambiguity may have existed before 1986 concerning whether the Act fully addressed that "need" in cases in which a State itself attempted to cheat the Union, the

1986 amendments unambiguously removed any doubt on the question. Indeed, as the court of appeals noted, the Senate Report that accompanied the legislation expressly noted that the Act "reaches all parties" who might defraud the government, including "States and political subdivisions thereof." S. REP. 345, at 8-9. While Vermont attempts to denigrate that statement as nothing more than the uninformed views of a later Congress on the meaning of language enacted more than a century earlier (Vt. Br. 26-27), its argument completely overlooks the fact that the controlling language ("any person") was enacted for the first time by the 1986 Congress. Thus, even if Vermont were correct in asserting that the 1986 Congress misconceived the original Act's scope, and that consequently it erred in its belief that the 1986 Act did not change the statute's breadth, the Court would still have to treat the Senate Report as "the authoritative source for legislative intent" with respect to the language at issue here, which was clearly enacted by the 1986 Congress. See *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986); see also *Blanchard v. Bergeron*, 489 U.S. 87, 91 (1989).

3. Finally, there is no force to Vermont's contention that Congress could not have intended that States be "persons" under the Act, because public entities are not ordinarily exposed to the "punitive" liability for treble damages or civil fines. Vt. Br. 20-21. This Court has repeatedly held that the double damages and fines provided for in the original Act were intended to serve remedial rather than punitive purposes, and afforded the government no more than "complete indemnity for the injuries done it," including "not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse." *United States v. Halper*, 490 U.S. 435, 444-45 (1989); see also *United States v.*

Bornstein, 423 U.S. at 314-15 & n.11; *United States ex rel. Marcus*, 317 U.S. at 549, 551-52.

That remedial rationale for the Act's damages and civil fines does not disappear, as Vermont contends, merely because Congress determined in 1986 that presumptively larger liquidated damages are now necessary to make the government whole. Indeed, even if Vermont were correct that the Act incorporates some punitive elements, that would not establish any incongruity in subjecting States to its provisions. Public entities ordinarily are exempt from such liability in order to spare innocent taxpayers from the burden of paying for the misdeeds of public officials. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267-69 (1981). That rationale carries little force where, as here, the issue is which set of taxpayers—state or federal—will be left to pay for the State's fraud. It is hardly incongruous to ascribe to Congress the intent to ensure that that burden will not be placed on the taxpayers of this Nation who have no direct ability to control the State's conduct. Compare *Block*, 461 U.S. at 290.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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16
No. 98-1828

In the Supreme Court of the United States

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,
PETITIONER

v.

UNITED STATES OF AMERICA, EX REL.
JONATHAN STEVENS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a State or state agency is a "person" subject to liability under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*
2. Whether a *qui tam* suit under the FCA against a State or state agency is barred by the Eleventh Amendment.

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John E. Nowak eds., 1987)	39

In the Supreme Court of the United States

No. 98-1828

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,
PETITIONER

v.

UNITED STATES OF AMERICA, EX REL.
JONATHAN STEVENS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-85) is reported at 162 F.3d 195. The opinion of the district court (Pet. App. 86-87) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1998. A petition for rehearing was denied on April 13, 1999. Pet. App. 89-90. The petition for a writ of certiorari was filed on May 12, 1999, and was granted on June 24, 1999. 119 S. Ct. 2391. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Property Clause of the United States Constitution, Article IV, Section 3, Clause 2; the Eleventh Amendment to the United States Constitution; and pertinent provisions of Sections 3729 and 3730 of Title 31, United States Code, are reproduced as an appendix to this brief.

STATEMENT

1. The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, "is used as the primary vehicle by the Government for recouping losses suffered through fraud." H.R. Rep. No. 660, 99th Cong., 2d Sess. 18 (1986). The FCA was enacted in 1863 (see Act of Mar. 2, 1863 (1863 Act), ch. 67, 12 Stat. 696), and "was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War," *United States v. Bornstein*, 423 U.S. 303, 309 (1976). In addition, Congress had before it substantial evidence "of fraud by state officials in the procurement of military supplies for state troops, the costs of which were ultimately borne by the United States." Pet. App. 25; see *id.* at 25-26 (discussing H.R. Rep. No. 2, 37th Cong., 2d Sess. Pt. ii-a (1862)). The 1863 Act provided that "any person not in the military" who submitted a false or fraudulent claim for payment by the United States government would "forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained." § 3, 12 Stat. 698.

The 1863 Act further provided that a suit to recover the statutory forfeiture "may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States." § 4, 12 Stat. 698. If the suit resulted in a monetary recovery, the award was divided evenly between the private plaintiff and the United States.

§ 6, 12 Stat. 698. In authorizing suits by private parties (known as relators) to collect the statutory forfeitures, the 1863 Act employed a venerable mode of procedure commonly referred to as a *qui tam* action.¹

The Act was amended in 1943 to preclude "parasitical" *qui tam* actions derived from information in the government's possession; to authorize the government to take over the prosecution of *qui tam* suits; and to reduce the relator's share of any recovery that such actions produced.² Except

¹ The term "*qui tam*" is an abbreviation for the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who brings the action for the King as well as for himself." *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086 n.1 (C.D. Cal. 1989). Blackstone explained:

[M]ore usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur*." If the king therefore himself commences this suit, he shall have the whole forfeiture. But if any one hath begun a *qui tam*, or *popular* action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself.

³ William Blackstone, *Commentaries on the Laws of England* *160 (footnotes omitted).

² In *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545-548 (1943), this Court held that a *qui tam* suit under the FCA could go forward even if the allegations in the complaint were derived entirely from a criminal indictment filed by the government in a related case. Congress amended the Act shortly thereafter to preclude *qui tam* suits "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 609; 31 U.S.C. 232(C) (1946); see *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649-

for the 1943 amendments, however, the Act remained substantially unchanged between 1863 and 1986. After a comprehensive re-examination of the FCA, Congress enacted the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, which substantially revised the Act "[i]n order to make the statute a more useful tool against fraud in modern times." S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986). *Inter alia*, the 1986 amendments increased the amount of damages and penalties to be awarded for violations; clarified the Act's scienter requirement and its definition of "claim"; expanded the rights of *qui tam* relators and allowed them to recover a somewhat greater share of any monetary award; and enhanced the government's ability to conduct investigations prior to the filing of FCA suits. See H.R. Rep. No. 660, 99th Cong., 2d Sess. 17 (1986).

In its current form, the FCA prohibits any "person" from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). A "person" who violates the FCA "is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).³

650 (D.C. Cir. 1994). The 1943 amendments also authorized the United States to take over the prosecution of a *qui tam* action at any time within 60 days after the suit was filed. § 1, 57 Stat. 608; 31 U.S.C. 232(C) (1946). Finally, the amendments provided that the relator would receive no more than 10% of the proceeds in suits taken over by the United States, and no more than 25% in suits prosecuted by the relator. § 1, 57 Stat. 609; 31 U.S.C. 232(E)(1) and (2) (1946).

³ Such a person "shall also be liable to the United States Government for the costs of a civil action to recover any such penalty or

For purposes of Section 3729, the term "person" is not defined. A different provision of the FCA authorizes the Attorney General to issue civil investigative demands (CIDs) compelling the production of evidence. 31 U.S.C. 3733. A CID may be issued "[w]henever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation." 31 U.S.C. 3733(a)(1). The term "false claims law investigation" is defined to mean "any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law." 31 U.S.C. 3733(l)(2). For purposes of Section 3733, "the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." 31 U.S.C. 3733(l)(4).

The FCA continues to authorize enforcement actions to be filed either by the Attorney General or by private relators. Section 3730(a) provides that "[i]f the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person." 31 U.S.C. 3730(a). Section 3730(b)(1) states that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. 3730(b)(1).

When a *qui tam* action is brought, the complaint is filed in camera and remains under seal for at least 60 days. 31 U.S.C. 3730(b)(2). The complaint "shall not be served on the de-

damages." 31 U.S.C. 3729(a). The "costs" to which Section 3729(a) refers do not include attorneys' fees or the costs of the government's investigation. The relator in a successful *qui tam* action may recover "an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs." 31 U.S.C. 3730(d)(1).

fendant until the court so orders," 31 U.S.C. 3730(b)(2), and the defendant "shall not be required to respond to any complaint filed under [Section 3730] until 20 days after the complaint is unsealed and served upon the defendant," 31 U.S.C. 3730(b)(3). The Act provides the government the opportunity to intervene in the suit "within 60 days after it receives both the complaint and the material evidence and information," 31 U.S.C. 3730(b)(2), in which case the government "shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action," 31 U.S.C. 3730(c)(1). The 60-day period may be extended by the district court if the government shows "good cause" for an extension. 31 U.S.C. 3730(b)(3).

The government retains significant prerogatives in *qui tam* litigation even when it declines to intervene at the outset of a suit. A *qui tam* suit "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. 3730(b)(1).⁴ If the government does not intervene within the initial 60-day period, "the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. 3730(c)(3). When it has intervened in a *qui tam* suit, "[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has

⁴ In the government's view, Section 3730(b)(1) makes the consent of the Attorney General an absolute prerequisite to the dismissal, pursuant to settlement, of a *qui tam* action. The Fifth Circuit has agreed. See *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 156-158 (5th Cir. 1997). The Ninth Circuit, by contrast, has held that the district court may approve the voluntary settlement and dismissal of a *qui tam* suit, notwithstanding the Attorney General's objection, if the court finds that the settlement is fair and reasonable. See *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720-724 (9th Cir. 1994).

provided the person with an opportunity for a hearing on the motion." 31 U.S.C. 3730(c)(2)(A).⁵

If a *qui tam* action results in a monetary award, the recovery is divided between the government and the relator. If the government takes control of the litigation, the relator generally "receive[s] at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim." 31 U.S.C. 3730(d)(1). Under certain circumstances the relator's share may be reduced to 10% or less of the total recovery. *Ibid.* If the government declines to take control of the litigation and the relator prosecutes the suit, the relator's share "shall be not less than 25 percent and not more than 30 percent of the proceeds." 31 U.S.C. 3730(d)(2).

2. The instant case involves a *qui tam* suit filed against petitioner State of Vermont Agency of Natural Resources. The relator, Jonathan Stevens (a respondent in this Court), was an employee of petitioner at the time of the alleged FCA violations. The complaint alleged that petitioner had submitted false claims to the United States Environmental Protection Agency (EPA) in connection with federal grant programs administered by the EPA pursuant to, *inter alia*, the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, and the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.* The grava-

⁵ Section 3730(c)(2)(A) entitles the relator to a hearing on the government's motion to dismiss a *qui tam* suit, but it does not specify the legal standard that the district court should apply in ruling on the relator's objection to such a motion. The Ninth Circuit has held that the government may intervene and dismiss a *qui tam* action, notwithstanding the relator's objection, if a rational relation exists between dismissal and accomplishment of a valid government purpose. See *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1143-1147 (1998), cert. denied, 119 S. Ct. 794 (1999). The court held, in particular, that the government may obtain dismissal of even a potentially meritorious *qui tam* suit if it reasonably believes that dismissal would serve a valid governmental interest, such as maintaining stability in a particular industry. 151 F.3d at 1144-1146.

men of the suit was that petitioner had overstated the amount of time spent by its employees on the federally-funded projects, thereby inducing the EPA to pay grant money to which petitioner was not entitled. See Pet. App. 5-7; J.A. 33-41 (complaint).

As required by the FCA, see 31 U.S.C. 3730(b)(2), the complaint in this case was filed in camera and under seal and was not served upon petitioner. Pet. App. 7. The United States declined to intervene to take over the action, and the complaint was subsequently unsealed and served. *Id.* at 7-8.⁶ Petitioner moved to dismiss the action, arguing that (1) a State or state instrumentality is not a "person" subject to liability under the FCA, 31 U.S.C. 3729; and (2) *qui tam* suits against state entities are barred by the Eleventh Amendment. Pet. App. 8.

The district court denied the motion to dismiss. Pet. App. 86-87. The court held that "the Eleventh Amendment does not bar suits such as the instant one because the United States, which has the ability to sue a state, is the real party in interest and ultimately the primary beneficiary of a successful *qui tam* action." *Id.* at 86. The court also observed, with respect to the issue of statutory construction, that "it would be anomalous to acknowledge that a state is a 'person' within the meaning of the statute if it chooses to bring a False Claims Act suit, but that the same state is not a 'person' if named as a defendant." *Id.* at 87.

3. Petitioner filed an interlocutory appeal, and the court of appeals affirmed. Pet. App. 1-85.⁷

⁶ The United States is a party in this Court, however, because it intervened in the court of appeals pursuant to 28 U.S.C. 2403(a) to defend the *qui tam* provisions of the FCA against petitioner's constitutional challenge. See Pet. App. 9.

⁷ As the court of appeals observed, this Court has held that a district court order denying a motion to dismiss based on a claim of Eleventh Amendment immunity is immediately appealable. See Pet. App. 9 (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*,

a. The court of appeals first held that the Eleventh Amendment does not bar a *qui tam* suit against a State or state agency. Pet. App. 14-18. The court observed that under established law, the Eleventh Amendment has no application to suits by the United States. *Id.* at 15-16. The court framed the relevant constitutional question as "whether a *qui tam* suit under the FCA should be viewed as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred." *Id.* at 16. In light of "[t]he interests to be vindicated, in combination with the government's ability to control the conduct and duration of the *qui tam* suit," the court of appeals concluded that the Eleventh Amendment does not bar *qui tam* actions against state defendants. *Ibid.*

The court of appeals explained that in its view "[t]he real party in interest in a *qui tam* suit is the United States." Pet. App. 16. The court observed that

[a]ll of the acts that make a person liable under [31 U.S.C.] § 3729(a) focus on the use of fraud to secure payment from the government. It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share—at least 70%—of any recovery.

Ibid. The court also explained that the government possesses substantial control over *qui tam* litigation, since it may intervene at the outset of the suit and retains significant prerogatives even if it does not intervene. *Id.* at 17. "In

506 U.S. 139, 147 (1993)). The court of appeals concluded that it possessed "pendent appellate jurisdiction" over the question "whether *qui tam* suits against the States are authorized by the Act." *Id.* at 19.

light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits," the court held that a *qui tam* suit "is in essence a suit by the United States and hence is not barred by the Eleventh Amendment." *Id.* at 18.

b. The court of appeals also held that petitioner is a "person" subject to the liability provision of the FCA, 31 U.S.C. 3729. Pet. App. 19-30. The court held that the interpretive question is not governed by any "plain statement" rule, explaining that "[t]he Act does not intrude into any area of traditional state power. The goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud. The States have no right or authority, traditional or otherwise, to engage in such conduct." *Id.* at 20-21. The court observed that "[w]hether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Id.* at 21 (quoting *Sims v. United States*, 359 U.S. 108, 112 (1959)).

In the court of appeals' view, several aspects of the FCA and its legislative history supported the conclusion that States are "person[s]" subject to suit under the Act. See Pet. App. 21-30. The court noted that States have historically been regarded as "person[s]" authorized to file *qui tam* actions under 31 U.S.C. 3730(b)(1), see Pet. App. 21-23, and it found no basis for inferring that Congress intended the word to have a different meaning in Section 3729(a)'s liability provision, see *id.* at 23-24. The court also explained that the FCA has consistently been given a broad construction as covering all frauds upon the United States, including frauds perpetrated by state officials, see *id.* at 25-27, and that the Senate Report accompanying the 1986 FCA amendments had expressed Congress's understanding that the term "person" as used in the Act includes States, see *id.* at 27-28. The court of appeals also pointed out that the word "person"

is defined to include States for purposes of 31 U.S.C. 3733, which governs the issuance of CIDs. See Pet. App. 28-29.⁸

Finally, the court of appeals rejected petitioner's contention that the FCA should be construed not to impose liability upon the States on the ground that the remedies available under the Act are "punitive" in nature. See Pet. App. 28-29. The court explained that the double-damages remedy provided by the FCA until its amendment in 1986

ha[d] been held not to be punitive but remedial, multiple damages being recoverable in order "to make sure that the government would be made completely whole," *United States ex rel. Marcus v. Hess*, 317 U.S. at 551-52, in light of the need "to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims," *United States v. Bornstein*, 423 U.S. at 315.

Id. at 29. The court saw "no impediment to Congress's applying this remedial structure against States who, in participating in federally funded programs, knowingly present fraudulent claims to the government." *Id.* at 29-30.

c. Senior District Judge Weinstein, sitting by designation on the court of appeals, dissented. The dissenting judge concluded that the suit was barred by the Eleventh Amendment. Pet. App. 31-85.

⁸ In discussing the CID provision, the court of appeals noted (see Pet. App. 28) that the term "false claims law investigation" is defined by 31 U.S.C. 3733(l)(2) to mean "any inquiry conducted . . . for the purpose of ascertaining whether any person is engaged in any violation of a false claims law." For purposes of Section 3733 generally, including Section 3733(l)(2), the term "person" is defined to include the States. See Pet. App. 28 (citing 31 U.S.C. 3733(l)(4)). The court of appeals observed that "[p]resumably, Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the 'persons' who are suable under the Act." *Id.* at 28.

SUMMARY OF ARGUMENT

I. A State or state agency is a "person" subject to potential FCA liability under 31 U.S.C. 3729(a). A contrary reading would not only preclude *qui tam* suits against state defendants, but would also foreclose the Attorney General from initiating FCA actions against state entities.

A. In construing statutes that define the relationship between regulated parties and the United States, this Court has repeatedly held that the term "person," or similarly general language, may appropriately be read to include the States, even in the absence of an express statutory directive to that effect. Whatever the constitutional status of *qui tam* suits against state defendants, FCA suits initiated by the Attorney General are not subject to any colorable Eleventh Amendment objection. The term "person" in the Act's liability provision, 31 U.S.C. 3729(a), therefore should not be given an artificially narrow construction simply because inclusion of States as potential defendants may create a substantial constitutional issue in *qui tam* litigation conducted by private relators.

B. The larger statutory context strongly suggests that a State or state agency is a "person" subject to potential FCA liability. This Court has consistently understood the FCA to establish a comprehensive remedy for fraud against the United States. Given the magnitude of federal financial assistance to States, it would be anomalous to exclude the States from the Act's coverage, particularly since the Act's prohibition of false or fraudulent claims does not impinge on any traditional state prerogative.

C. The FCA's other uses of the word "person" confirm Congress's intent to subject the States to FCA liability. For purposes of 31 U.S.C. 3733, the term "person" is defined to include States. 31 U.S.C. 3733(l)(4). Section 3733 uses the word "person" to describe both the class of entities to whom civil investigative demands may be issued, and the class of

entities who may be "engaged in a[] violation of a false claims law." 31 U.S.C. 3733(l)(2). The latter use of the word presupposes that a State is subject to FCA liability if it knowingly submits a false claim. The Act also uses the word "person" to describe the class of potential relators. States have filed *qui tam* actions in the past; their right to do so has not been questioned; and Congress in enacting the 1986 FCA amendments assumed that a State is a proper relator. Because a word is generally presumed to carry a consistent meaning when it appears in different sections of the same statute, Congress's use of the word "person" to describe both relators and FCA defendants reinforces the view that a State or state agency is subject to the Act's liability provision.

D. The legislative history of the 1986 FCA amendments also demonstrates Congress's intent that States would be subject to the Act. The Senate Report accompanying those amendments expressed the understanding that States were covered under pre-existing law. Although Congress engaged in a comprehensive review of the Act and amended it in numerous respects, the Act as amended continues to use the word "person" to describe the class of entities subject to potential liability. In light of Congress's expressed understanding that the word in this context includes the States, its continued use of the term to describe potential defendants is highly probative evidence that Congress intended that the States be subject to the Act's liability provisions.

E. There is nothing anomalous or improper about subjecting state entities to the remedies (three times the amount of the government's damages, plus a civil penalty of between \$5000 and \$10,000) provided by the FCA. This Court has squarely held that the FCA remedies in effect prior to 1986—double damages plus a \$2000 civil penalty—were intended to serve predominantly compensatory purposes. There is no reason to suppose that Congress in 1986 sought fundamentally to transform the nature of the re-

medies available under the Act. The Court has also recognized, in discussing the relief available under the antitrust laws, that while treble damages remedies serve in part to punish violators, they further substantial compensatory and deterrent purposes as well. Finally, common law and/or administrative remedies would consistently fail to make the government whole, since they would not compensate the United States for its costs of investigation and suit. There is no reason that the federal rather than the state government should bear that loss in a case where the State has knowingly submitted a false claim.

II. In ratifying the Constitution, the States consented to suits brought by the federal government. While a *qui tam* suit is not literally a suit brought by a federal officer, it is properly treated as the equivalent of such a suit for purposes of Eleventh Amendment immunity. A *qui tam* suit is brought to redress an injury to the United States; the monetary recovery goes largely to the United States; and the suit may not go forward over the objection of the United States. Because a *qui tam* action under the FCA vindicates the proprietary interests of the federal government, and is subject to significant control by the United States, it is not barred by the Eleventh Amendment.

A. At (and before) the Constitution was ratified, the *qui tam* suit was a well-established mechanism for collecting obligations owed to the government. A *qui tam* suit under the FCA is an unusual hybrid having significant characteristics of both a private and a public action. The relator (like the typical plaintiff in private civil litigation) has a personal financial stake in the suit, and the premise of the Act is that he will seek to further that private interest. On the other hand, the gravamen of a *qui tam* suit is an allegation of wrong done to the federal government (rather than to the relator personally), and the bulk of any monetary recovery goes to the United States. Thus, while a *qui tam* relator possesses a personal stake in the outcome of his suit, Congress

employed the *qui tam* mechanism to further the important public interest in redressing and deterring acts of fraud against the government.

The Property Clause of the Constitution, Art. IV, § 3, Cl. 2, vests Congress with broad authority to control and dispose of the property of the United States. A bar on *qui tam* suits against state defendants would impair Congress's exercise of that authority by disabling it from using what it believed to be the most efficacious way of protecting the federal government from fraudulent claims. Moreover, the United States' chose in action against a State or state agency that has submitted a false claim is itself a species of property that may, under ordinary principles of property law, be assigned to a private party. The *qui tam* mechanism is in practical effect a partial assignment of that chose in action to the private party who first files suit. If the Eleventh Amendment is construed to bar *qui tam* suits against state defendants, then Congress is effectively precluded from assigning the government's chose in action, in derogation of Congress's authority under Article IV to dispose of property belonging to the United States.

B. Even where the government initially declines to intervene to take over the conduct of a *qui tam* action, it retains significant incidents of control over such suits. Because the relator cannot proceed over the objection of the Attorney General, the dissenting judge in the court of appeals was mistaken in asserting that a *qui tam* suit is insulated from the judgment of politically accountable officials.

C. In a variety of contexts, this Court has held that application of state sovereign immunity principles turns on the nature of the interests affected by a particular suit or category of suits. Thus, the determination whether a suit is one "against one of the United States" depends not simply on the identity of the nominal defendant, but on the suit's likely practical effects upon the State. The Court has employed a similar "real party in interest" test to decide

whether a State is a real or merely a nominal plaintiff in a suit brought against another State. The Court has also held that "*Ex parte Young*" suits may be brought against individual state officers, notwithstanding the acknowledged impact of such suits upon the State itself, because they play a crucial role in ensuring the supremacy of federal law. Similarly here, the gravamen of an FCA suit is an allegation of wrong done to the United States as a corporate entity, the federal government is the principal beneficiary of any successful action, and the government retains ultimate control over whether or not the suit will proceed. The suit therefore retains its fundamental public character regardless of whether it is brought by the government or by a *qui tam* relator.

ARGUMENT

I. PETITIONER IS A "PERSON" SUBJECT TO LIABILITY UNDER THE FCA

The FCA imposes liability on any "person" who engages in specified fraudulent or deceptive practices involving the funds or other property of the United States. 31 U.S.C. 3729(a). That liability may be enforced through any one of three basic mechanisms. First, the Attorney General may bring suit directly against a "person" she believes to be in violation of the Act. 31 U.S.C. 3730(a). Second, the government (through the Attorney General) may intervene to take over the conduct of a *qui tam* suit. 31 U.S.C. 3730(b)(4)(A) and (c)(1). Finally, if the government declines to intervene, the relator "shall have the right to conduct the action." 31 U.S.C. 3730(b)(4)(B).

Relying on various canons of construction largely developed in the context of private suits, petitioner argues (see Br. 12-17) that a State or state agency may not be treated as a "person" subject to potential liability under the FCA unless Congress has unequivocally manifested that intent. Petitioner's argument in that regard focuses almost exclu-

sively on the dangers to federalism ostensibly posed by *qui tam* suits against state defendants. The practical consequence of petitioner's reading of the word "person," however, is that *none* of the Act's enforcement mechanisms will be available against state entities that knowingly submit false claims to the federal government. Although petitioner's objections are directed almost exclusively to the FCA's *qui tam* provisions, petitioner would "save" the statute by disabling the Attorney General from enforcing the Act against entities that receive a substantial (and rapidly growing) share of federal outlays. Such a construction of the statute would be inconsistent with the text, the history, and the purposes of the FCA, which is "used as the primary vehicle by the Government for recouping losses suffered through fraud," H.R. Rep. No. 660, 99th Cong., 2d Sess. 18 (1986) (1986 House Report). Nothing in this Court's jurisprudence supports that anomalous result.⁹

⁹ This case involves petitioner's interlocutory appeal from the district court's denial of its motion to dismiss. See Pet. App. 8-9. This Court has held that the denial of a motion to dismiss on Eleventh Amendment grounds is immediately appealable under the collateral order doctrine. See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993). In the instant case, the Second Circuit held that it possessed "pendent appellate jurisdiction" over the question whether *qui tam* suits against States are authorized by the FCA. Pet. App. 19; accord *United States ex rel. Long v. SCS Business & Technical Inst., Inc.*, 173 F.3d 870, 873, supp. op., 173 F.3d 890 (D.C. Cir. 1999), petition for cert. pending, No. 99-213 (filed Aug. 2, 1999).

This Court has generally disapproved the concept of pendent appellate jurisdiction. See *Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995). The Court has suggested, however, that the exercise of such jurisdiction might be proper under some circumstances, as where the appealable and non-appealable rulings are "inextricably intertwined," or where review of the "pendent" holding is "necessary to ensure meaningful review of the" ruling that is independently appealable. *Id.* at 50-51. Even assuming that the district court's denial of petitioner's motion to dismiss on statutory grounds is not independently subject to immediate appellate

A. In Statutes That Define The Relationship Between Regulated Parties And The United States, The Word "Person" Has Generally Been Construed To Include The States

Petitioner contends (Br. 10-12) that the word "person" presumptively excludes the States and their agencies, and that a clear statement of congressional intent is required to rebut that presumption.¹⁰ That claim is incorrect.

In cases involving private suits against state defendants, this Court has stated that "in common usage, the term 'person' does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (brackets omitted); accord, *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979). In construing statutes that define the relationship between regulated parties and the United States, however, the Court has repeatedly held that the term "person," or similarly general language, may appropriately be read to include the States, even in the absence of an express statutory directive to that effect.

review, we believe that the statutory issue is logically antecedent to the Eleventh Amendment question, and that the court of appeals' exercise of pendent appellate jurisdiction was therefore proper. Indeed, it would contravene accepted principles of constitutional adjudication for this Court to determine whether the Eleventh Amendment bars the instant *qui tam* action without first deciding whether Congress has authorized such suits to be filed against state entities.

¹⁰ Petitioner also contends (Br. 10-12) that the "plain language" of Section 3729(a) compels the conclusion that States are not covered. Petitioner thus appears to suggest that the word "person" cannot, as a matter of law, include a State. That position is directly contrary to this Court's precedents. See, e.g., *Sims v. United States*, 359 U.S. 108, 112 (1959) ("Whether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment."); *Georgia v. Evans*, 316 U.S. 159, 161 (1942); page 19, *infra*.

Thus, in *California v. United States*, 320 U.S. 577, 585 (1944), the Court held that a State in its operation of wharves and piers is a "person" subject to the regulatory authority of the United States Maritime Commission under the Shipping Act, 1916. The Court explained that "with so large a portion of the nation's dock facilities * * * owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *Id.* at 585-586. In *Ohio v. Helvering*, 292 U.S. 360, 367-371 (1934), the Court held that a State was subject to a federal tax imposed on "[e]very person" engaged in the sale of alcoholic beverages. And in *United States v. California*, 297 U.S. 175, 183-187 (1936), the Court held that a State in operating a railroad is a "common carrier" subject to an action for penalties brought by the United States under the Safety Appliance Act. The Court explained that

[t]he presumption [against construing general language to include the enacting sovereign] is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.

Id. at 186 (citation omitted). Indeed, petitioner has identified *no* case involving a dispute between the United States and a State in which the word "person" has been held to exclude the States.

The foregoing lines of authority are easily harmonized. In light of "the constitutional role of the States as sovereign

entities," *Alden v. Maine*, 119 S. Ct. 2240, 2247 (1999), statutory provisions that primarily serve to define the obligations that private parties owe to each other—and, in particular, provisions that define the circumstances under which private suits can go forward—cannot readily be assumed to apply to the States. In *Will*, for example, the Court emphasized that to construe the word "person" in 42 U.S.C. 1983 to include a State or state agency would effectively divest the States of their traditional immunity from private suits. See 491 U.S. at 66-67 & nn.6-7, 70.¹¹ In its relations with the national government, however, a State is not "the sovereign." This Court has

recognized that the Constitution presents no barrier to lawsuits brought by the United States against a State. For purposes of such lawsuits, States are naturally just like "any nongovernmental entity"; there are no special rules dictating when they may be sued by the Federal Government, nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits. Indeed, this Court has gone so far as to hold that no explicit statutory authorization is necessary before the Federal Government may sue a State. See *United States v. California*, 332 U.S. 19, 26-28 (1947).

¹¹ The Court in *Will* made clear that its construction of the word "person" as excluding state entities "applie[d] only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes," and did not extend to municipalities (which have no Eleventh Amendment immunity). 491 U.S. at 70. The Court also tracked Eleventh Amendment jurisprudence in holding that a state officer sued in his official capacity is a "person" when sued for prospective injunctive relief, but is not a "person" when sued for retrospective monetary relief. *Id.* at 70-71 & n.10; see pages 43-44, 45-46, *infra*.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 11-12 (1989);¹² cf. *North Dakota v. Block*, 461 U.S. 273, 288-290 (1983) (noting general rule of construction that statutes of limitation do not apply to States absent a clear indication that States are covered, but holding that the rule is inapplicable where a State attempts to sue the United States).

As we explain in Part II, *infra*, the Eleventh Amendment does not bar *qui tam* suits under the FCA against States or state agencies because such actions serve to redress legal wrongs done to the federal government itself, and because *qui tam* actions are subject to significant control by the Attorney General. Insofar as the question of statutory construction is concerned, however, the crucial point is that, whatever the constitutional status of *qui tam* suits against state defendants, FCA suits initiated by the Attorney General pursuant to Section 3730(a) are not subject to any colorable Eleventh Amendment objection. See, e.g., *Alden*, 119 S. Ct. at 2267 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); *West Virginia v. United States*, 479 U.S. 305, 311 (1987) ("States have no sovereign immunity as against the Federal Government."). The term "person" in the Act's liability provision, 31 U.S.C. 3729(a), therefore should not be given an artificially narrow construction simply because inclusion of States as potential defendants may create a substantial constitutional issue in *qui tam* litigation conducted by private relators.¹³

¹² The Court has since overruled *Union Gas*'s holding that Congress in the exercise of its Commerce Clause authority may abrogate the States' Eleventh Amendment immunity. See *Seminole Tribe v. Florida*, 517 U.S. 44, 63-73 (1996). Neither *Seminole Tribe* nor any other decision of this Court, however, casts doubt on the principle of statutory construction set forth in the text.

¹³ Where the government intervenes in a *qui tam* action to take over the conduct of the litigation, the suit is not meaningfully different, for Eleventh Amendment purposes, from a suit initially brought by the

The Court made a quite similar point in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). That case involved a *qui tam* suit against electrical contractors who had engaged in a bid-rigging scheme; the defendants' contracts were with local governmental units, but a large portion of their pay came from the United States. *Id.* at 539 & n.1. The court of appeals held that the FCA's liability provision should be narrowly construed to exclude persons having no direct contractual relationship with the federal government, on the ground that *qui tam* suits had traditionally been regarded with disfavor. See *id.* at 540-541.

United States. The filing of a *qui tam* complaint carries no immediate consequence for the named defendant(s). To the contrary, the FCA specifically provides that "[t]he complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. 3730(b)(2). If the United States intervenes to take over the litigation during the period when the complaint remains under seal, its intervention effectively cures any Eleventh Amendment defect that might otherwise exist. The relator's continued participation as a party after the United States' intervention (see 31 U.S.C. 3730(c)(1)) also creates no constitutional difficulty, at least so long as the relator raises no claims distinct from those of the government. Cf. *Arizona v. California*, 460 U.S. 605, 614 (1983) (Indian Tribes were properly allowed to intervene in suit brought by the United States against a State; because "[t]he Tribes d[id] not seek to bring new claims or issues against the States, * * * [the Court's] judicial power over the controversy [wa]s not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment [wa]s not compromised.").

Unpublished statistics maintained by the Civil Division of the Department of Justice indicate that total civil fraud recoveries between October 1986 and September 1999 have been approximately \$6 billion, of which just under half represents recoveries in *qui tam* suits. Of the government's total *qui tam* recoveries, approximately \$224 million came in suits conducted to their conclusion by private relators; the remainder was derived from cases where the government intervened to take over the prosecution of the suit.

This Court rejected that approach. It first questioned the contention that *qui tam* suits are disfavored, noting that such actions "have been frequently permitted by legislative action, and have not been without defense by the courts." 317 U.S. at 541. It also explained, however, that the court of appeals'

interpretation of "utmost strictness" narrows not only the *qui tam* aspect of the Act, but also the criminal provisions. The decision below treats the language of [the FCA's liability provision] in such fashion that no criminal proceedings could be brought against the respondents, a result to which the policy on *qui tam* actions is immaterial even if it exists or could properly be applied. This "*qui tam* policy" could not be used to detract from the meaning of the language in the criminal section; and we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer.

Congress has power to choose this method [*i.e.*, criminal prosecutions] to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours.

Id. at 541-542. Essentially the same analysis applies here. Insofar as petitioner's statutory argument rests on objections that are specific to *qui tam* suits, those objections provide no basis for construing the FCA's liability provision in a manner that would preclude the Attorney General from seeking redress under the Act for fraud committed by States and state agencies.¹⁴

¹⁴ For the reasons stated above, the supposed proliferation of *qui tam* suits against state defendants would provide no basis for construing

B. The Subject Matter Of The FCA Strongly Suggests That States And State Agencies Are Subject To Potential Liability Under The Act

The larger statutory context strongly suggests that a State or state agency is a "person" subject to potential FCA liability. The Act is intended to supply a comprehensive remedy for fraud against the United States, and the submission of false claims by state officials causes precisely the same harms as do other fraudulent efforts to obtain federal money or property. "In the various contexts in which questions of the proper construction of the [FCA] have been presented, the Court has consistently refused to accept a rigid, restrictive reading." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). Rather, the Court has construed the Act to extend to "all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233; see S. Rep. No. 345, 99th Cong., 2d Sess. 9 (1986) (*1986 Senate Report*) ("The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services.").

Over half a century ago, this Court observed that "[w]hile at the time of the passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately 10% of all federal money was distributed in this form. These funds are as much in need for protection from fraudulent claims as any other federal money." *Marcus*, 317 U.S. at 544. In more recent years, "States have received a significant and increasing amount of federal funding: federal grants to state and local governments more

Section 3729(a) in a manner that would preclude the Attorney General from bringing FCA actions against state defendants. It nevertheless bears noting that petitioner's citation of six cases decided within the past decade hardly establishes that "the number of *qui tam* suits brought against States has mushroomed." Pet. Br. 14 n.4.

than doubled from \$108 billion in 1987 to \$228 billion in 1996." *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 874 (8th Cir. 1998). In light of the increased (and increasing) magnitude of federal financial assistance to States, it would be anomalous to exclude the States from coverage by "the Government's primary litigative tool for combatting fraud." *1986 Senate Report* 2. Cf. *United States v. California*, 297 U.S. 175, 186 (1936) (finding "no reason * * * to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action").

The requirement that States refrain from submitting false claims to the United States does not impinge on any sovereign prerogative or "upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). As the court of appeals correctly recognized, the FCA "does not intrude into any area of traditional state power." Pet. App. 21. The Act serves "to remedy and deter procurement of federal funds by means of fraud," and "[t]he States have no right or authority, traditional or otherwise, to engage in such conduct." *Ibid.* Petitioner chose to accept the benefits of a federal grant program, and it is neither anomalous nor surprising that petitioner—like other federal fund recipients—is subject to the substantive and remedial provisions designed to ensure that it is entitled to the money and that the funds are used for their intended purpose.¹⁵

¹⁵ The Court in *Gregory* held that, absent an unambiguous expression of congressional intent, it would not construe the Age Discrimination in Employment Act to invalidate a Missouri constitutional provision requiring state judges to retire at age 70. The Court explained that the establishment of qualifications for state judges "is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." 501 U.S. at 460. It

C. The FCA's Other Uses Of The Word "Person" Confirm That States And Their Agencies Are Subject To Potential FCA Liability

1. Congress's intent to subject States to the FCA's liability provisions is confirmed by 31 U.S.C. 3733, which authorizes the Attorney General to issue civil investigative demands (CIDs) compelling the production of evidence. For purposes of Section 3733, "the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." 31 U.S.C. 3733(l)(4). Section 3733 uses the word "person" in two distinct contexts. First, Section 3733 provides that a CID may be issued "[w]henever the Attorney General has reason to believe that any *person* may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation." 31 U.S.C. 3733(a)(1) (emphasis added). Second, Section 3733 defines the term "false claims law investigation" to mean "any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any *person* is or has been engaged in any violation of a false claims law." 31 U.S.C. 3733(l)(2) (emphasis added).

Thus, Section 3733's use of the word "person" is not limited to describing the class of entities to whom CIDs may be issued. Rather, Section 3733(l)(2) uses the word "person"

concluded on that basis that "[c]ongressional interference with this decision of the people of Missouri * * * would upset the usual constitutional balance of federal and state powers." *Ibid.*

Unlike the State in *Gregory*, petitioner does not contend that the substantive prohibition contained in the FCA—i.e., the Act's ban on the knowing submission of false claims to the federal government—could impair a State's exercise of sovereignty. Rather, petitioner argues (Br. 13-15) that application of the FCA to the States would alter the federal-state balance because the Act (1) provides for enforcement by private *qui tam* suits and (2) contains remedial provisions that are "punitive" in nature. We address those contentions at pages 18-23 *supra*, and 30-33, *infra*.

—specifically defined to include the States—to describe the class of entities who may be "engaged in a[] violation of a false claims law." That use of the word presupposes that States are subject to potential FCA liability under Section 3729(a). See Pet. App. 28 ("Presumably, Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the 'persons' who are suable under the Act.").

2. Both before and after the 1986 amendments, the FCA has also used the word "person" to describe the class of potential relators. See 31 U.S.C. 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government."). As the court of appeals explained (Pet. App. 22-23), States have filed *qui tam* actions in the past; their right to do so has not been questioned; and Congress in enacting the 1986 FCA amendments assumed that a State is a proper relator.¹⁶

¹⁶ The 1986 Senate Report discussed the case of *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). See 1986 Senate Report 12-13. The court in *Dean* construed the pre-1986 version of the FCA to preclude a *qui tam* action based on information in the federal government's possession, even where the relevant information had been brought to the government's attention by the relator (the State of Wisconsin) itself. The National Association of Attorneys General (NAAG) shortly thereafter urged Congress to amend the FCA, arguing that "to prohibit sovereign states from becoming *qui tam* plaintiffs because the U.S. Government was in possession of information provided to it by the States and declines to intercede in the State's lawsuit, unnecessarily inhibits the detection and prosecution of fraud on the Government." 1986 Senate Report 13 (quoting NAAG resolution). The 1986 Senate Report also observed that the federal government had filed a brief in *Dean* "indicating its belief that Wisconsin was a proper relator." *Ibid.*; see *Dean*, 729 F.2d at 1102-1103 n.2 (noting government filing in the district court).

Congress directly addressed the *Dean* decision in the 1986 FCA amendments by enacting 31 U.S.C. 3730(e)(4). Section 3730(e)(4) modified the prior jurisdictional barrier by changing its focus from government

Because the “normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning,” *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996), Congress’s use of the same word to describe both relators and FCA defendants reinforces the view that a State or state agency is subject to the Act’s liability provision.

D. The Legislative History Of The 1986 FCA Amendments Demonstrates Congress’s Intent That States Would Be Subject To The Act

The FCA was comprehensively amended in 1986 (see False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153) in order “to strengthen and clarify the government’s ability to detect and prosecute civil fraud and to recoup damages suffered by the government as a result of such fraud.” 1986 House Report 16. The Senate Report accompanying the 1986 legislation expressed the understanding, with respect to the pre-amendment version of the Act, that “[t]he term ‘person’ is used in its broad sense to include partnerships, associations, and corporations * * * as well as States and political subdivisions thereof.” 1986 Senate Report 8. As amended in 1986, the FCA continues to use the word “person” to describe the class of entities subject to potential liability. 31 U.S.C. 3729(a); see Pub. L. No. 99-562, § 2, 100 Stat. 3153. In light of Congress’s expressed understanding that the word in this context includes the States, its continued use of the term to describe potential defendants is highly probative evidence that Congress

possession to “public disclosure” of the relevant information, and by adding an “original source” exception to the jurisdictional bar. Although Congress substantially rewrote the FCA’s *qui tam* provisions, the Act as amended in 1986 continues to use the word “person” to describe the class of potential relators—a class that has long been assumed to include the States.

intended that the States be subject to the Act’s liability provisions.

Petitioner contends (Br. 25-26) that the 1986 Senate Report is “entitled to no weight” because “[i]t is simply an attempt by committee members of a later Congress to expound on the meaning of a statute passed by another Congress some 123 years earlier.” Contrary to petitioner’s suggestion, however, the disputed provision of current law—*i.e.*, the phrase “[a]ny person who” in Section 3729(a)—was enacted in 1986, not in 1863. Section 2 of the 1986 FCA amendments began:

Section 3729 of title 31, United States Code, is amended—

(1) by striking the matter preceding paragraph (1) and inserting the following:

“(a) LIABILITY FOR CERTAIN ACTS.—Any person who—”

§ 2, 100 Stat. 3153. Thus, the word “person” in current Section 3729(a) is the product of the 1986 legislation, not a remnant of prior law.¹⁷

The 1986 Congress’s understanding of the word “person” is therefore directly relevant to the proper construction of the present statutory language. The 1986 Senate Report—the authoritative source for finding the Legislature’s intent, see *Garcia v. United States*, 469 U.S. 70, 76 (1983)—expressed a clear understanding that the Act in its then-

¹⁷ The fact that the word “person” had also been used in earlier versions of the FCA does not alter the fact that in construing Section 3729(a) in its present form, the relevant intent is that of the 1986 Congress. Compare *United States v. Sheffield Board of Comm’rs*, 435 U.S. 110, 134 (1978) (“When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby.”).

current form included States within the class of "persons" subject to potential liability for the submission of false claims. Congress then amended the Act in numerous respects but continued to use the term "person" to describe the class of potential defendants. That sequence of events can only be understood as an expression of congressional intent to include States within the class of potential defendants.¹⁸

E. The Remedies Provided By The FCA Are Not Presumptively Inapplicable To Governmental Entities

Petitioner contends that the remedies provided by the FCA (three times the amount of the government's damages, plus a civil penalty of between \$5000 and \$10,000) are "inherently punitive in nature" (Pet. Br. 20-21) and are therefore presumptively inapplicable to governmental entities (*id.* at 21-22). That argument is incorrect.

1. This Court has squarely held that the FCA remedies in effect prior to 1986—double damages plus a \$2000 civil penalty—were intended to serve predominantly compensatory purposes. See *United States v. Bornstein*, 423 U.S. 303, 315 (1976) (FCA's remedial provisions reflect "the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims"); *Marcus*, 317 U.S. at 551-552 ("We think the chief purpose of

¹⁸ This is so whether or not Congress correctly interpreted pre-existing law. There may be instances in which Congress's overriding intent is to maintain in place the current rules—regardless of precisely what those rules are—on the theory that it is sometimes more important that legal questions be settled than that they be settled right. No such intent can plausibly be ascribed, however, to the Congress that enacted the 1986 FCA amendments, which were preceded by comprehensive scrutiny of all aspects of the FCA, and which effected a thoroughgoing revision of the Act. See 1986 House Report 29 (explaining that the 1986 amendments would accomplish "a complete rewrite of Section 3729 of title 31, United States Code").

the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."); see also *United States v. Halper*, 490 U.S. 435, 446 (1989) (in order to obtain "rough remedial justice," the government "may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages"). Nothing in the legislative history of the 1986 FCA amendments suggests that Congress sought fundamentally to transform the nature of the remedies available under the Act—much less that it contemplated that the increase would have the effect of excluding governmental bodies from the Act's coverage.¹⁹

2. This Court has rejected efforts to equate statutory treble damages provisions with a common law punitive damages remedy. In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the Court concluded that its prior decision in *Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101 (1893), which held that a principal cannot be found liable for punitive damages based on the conduct of an agent acting with apparent authority, should not be extended to a claim for treble damages under the antitrust laws. The Court explained:

It is true that antitrust treble damages were designed in part to punish past violations of the antitrust laws. But

¹⁹ The 1986 House Report recommended that the damages and civil penalties available under the Act be increased "in order that the False Claims Act penalties will have a strong deterrent effect; will make the Government whole for its losses; and to update the penalty enacted in 1863 to reflect the passage of time and the effects of inflation." 1986 House Report 20. With respect to the civil penalty provision in particular, the Report stated that the then-existing penalty of \$2000 per violation was "outdated" because it had not been changed since 1863 and "the buying power of \$2,000 in 1863 would be close to \$18,000" in 1986. *Id.* at 17.

treble damages were also designed to deter future antitrust violations. Moreover, the antitrust private action was created primarily as a remedy for the victims of antitrust violations. Treble damages make the remedy meaningful by counterbalancing the difficulty of maintaining a private suit under the antitrust laws. Since treble damages serve as a means of deterring antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold [the defendant] liable for the acts of agents committed with apparent authority. See Restatement § 217C, Comment c, p. 474 (rule limiting principal's liability for punitive damages does not apply to special statutes giving triple damages).

456 U.S. at 575-576 (citations and internal quotation marks omitted). See also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 (1977) (although treble damages under the antitrust laws "play an important role in penalizing wrongdoers and deterring wrongdoing, * * * [i]t nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy").²⁰

3. In arguing that the term "person" should be construed to exclude the States, petitioner seeks to escape even the component of its potential FCA liability (*i.e.*, the pre-1986

²⁰ The Court has characterized antitrust treble damages awards as serving important compensatory purposes despite the fact that the antitrust laws provide for a separate award of attorneys' fees. 15 U.S.C. 15(a); see *Brunswick*, 429 U.S. at 481-482. Because the United States cannot separately recover attorneys' fees or its costs of investigation in an FCA suit (see note 3, *supra*), the trebling of damages in this context is even more readily understood as a means of roughly approximating the losses incurred by the government as a result of a defendant's fraudulent act.

remedy of double damages plus a \$2000 civil penalty for each false claim) that this Court has specifically held to be compensatory in nature. We may assume that in some cases the remedies currently available under the FCA will exceed the amount necessary to compensate the government for the losses it incurs as a result of the defendant's fraud. It is beyond dispute, however, that common law and/or administrative remedies would consistently fail to make the government whole, since they would not compensate the United States for its costs of investigation and suit. There is no reason that the federal rather than the state government should bear that loss in a case where the State has knowingly submitted a false claim.²¹

II. BECAUSE A QUI TAM ACTION SERVES TO PROTECT THE PROPERTY OF THE UNITED STATES GOVERNMENT, AND IS SUBJECT TO SIGNIFICANT CONTROL BY THE UNITED STATES, IT IS NOT BARRED BY THE ELEVENTH AMENDMENT

This Court's Eleventh Amendment jurisprudence reflects the Court's continuing effort properly to define "the fundamental constitutional balance between the Federal Government and the States." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). On the one hand, the States are

²¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), originated as a *qui tam* suit brought against an officer of the Bank of the United States by a private party under a Maryland law giving an informer one-half of the statutory penalty. *Id.* at 317, 321-322; see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 537 (1832) (noting that *McCulloch* "was a *qui tam* action, brought to recover a penalty"). Perhaps because the Bank's charter contained a sue-and-be-sued provision, see Act of Apr. 10, 1816, ch. 44, § 7, 3 Stat. 269, the officer's susceptibility to suit was not contested. The Court—while obviously cognizant of the threat to federal authority that the Maryland tax entailed—appears to have seen no anomaly in the use of a *qui tam* suit for penalties as a means of adjudicating the rights and obligations of an instrumentality of the United States.

"sovereign entities," *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.15 (1996), whose interests ordinarily may not—even with the authorization of Congress—be subordinated to the interests of individuals. The States are themselves subordinate, however, to the national government and the national polity, and their immunity from suit does not extend so far as to thwart the vindication of important federal interests or undermine the supremacy of federal law.

A *qui tam* suit under the FCA is a mechanism by which the energies of private citizens are enlisted to serve fundamentally national ends. As the court of appeals in this case recognized, a *qui tam* suit serves to redress an injury done to the United States; the government receives the bulk of any recovery; and the government retains significant prerogatives in *qui tam* litigation under the FCA. Pet. App. 16-17. Based on those considerations, the court concluded that a *qui tam* suit "is in essence a suit by the United States and hence is not barred by the Eleventh Amendment." *Id.* at 18 (emphasis added).

The court of appeals was correct. To be sure, a *qui tam* action is not literally filed by a federal officer: the *qui tam* relator himself is a private party rather than an officer or employee of the Executive Branch. Nonetheless, because a *qui tam* suit vindicates the property interests of the United States and is subject to significant control by the United States, it is "in essence" a suit by the United States—the equivalent of such a suit—for purposes of Eleventh Amendment immunity.

A. The *Qui Tam* Mechanism Is A Well-Established Hybrid That Has Characteristics Of Private Suits But Was Employed By Congress In The FCA As A Means Of Protecting The Property Of The United States

1. At (and before) the time the Constitution was ratified, the *qui tam* suit was a well-established mechanism for collecting monetary obligations owed to the government. In *Marvin v. Trout*, 199 U.S. 212 (1905), the Court observed:

Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government. The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer.

Id. at 225; see also *Marcus*, 317 U.S. at 541 n.4 (quoting *Marvin*, 199 U.S. at 225); note 1, *supra*. The Court in *Marvin* also noted that "[l]egislation giving an interest in the forfeiture to a common informer has been frequent in Congressional legislation relating to revenue cases." 199 U.S. at 225.²²

A *qui tam* suit under the FCA is an unusual hybrid having significant characteristics of both a private and a public action. The hybrid character of the suit is reflected in the fact that the relator brings suit "for the person and for the United States Government," 31 U.S.C. 3730(b)(1)—a formulation that accords with historical usage. See note 1,

²² One district court has explained that "[o]f the fourteen statutes imposing penalties enacted by the First Congress, between ten and twelve authorized *qui tam* suits." *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086 (C.D. Cal. 1989); see *id.* at 1086 n.2 (citing statutes).

supra (explaining that the term "*qui tam*" is derived from a Latin phrase meaning "who brings the action for the king as well as for himself").

On the one hand, the relator in an FCA *qui tam* suit is similar in significant respects to a plaintiff in a private civil action. The relator does not hold a formal position within the government, and he is not selected in the manner specified by the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) for "Officers of the United States." The relator does not take an oath of office, and in his conduct of a *qui tam* action he does not owe primary allegiance to the government. Unlike a public official conducting litigation on behalf of the government, the relator has a personal financial stake in the suit, and the premise of the Act is that he will be motivated at least in substantial part by the desire to further that private interest. Thus, the Court recently observed that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

In other respects, however, a *qui tam* suit is properly regarded as public rather than private litigation. A *qui tam* complaint does not allege that the relator was personally injured by the defendant's unlawful conduct.²³ Rather, the

²³ In some cases the relator in a *qui tam* suit may also allege personal injury arising from the defendant's overall course of conduct. The most obvious example is the allegation that the relator was subjected to adverse employment action in retaliation for his participation or assistance in a false claims investigation. The FCA's "whistleblower" provision, 31 U.S.C. 3730(h), establishes a federal cause of action for the victims of such retaliation. A suit under Section 3730(h), however, is not a *qui tam* action: it is brought on behalf of the employee alone; it requires no allegation of fraud against the United States; and the employee keeps the entire recovery (if the suit is successful) rather than sharing it with the government.

gravamen of a *qui tam* suit is an allegation of wrong done to the federal government as a corporate entity. And because the government takes 70% or more of any recovery, see 31 U.S.C. 3730(d)(1) and (2), the suit if successful will redound primarily to the benefit of the United States. In addition, the government retains significant prerogatives in *qui tam* litigation, including the authority to intervene either to prosecute the suit or obtain its dismissal, even when it declines to take over the suit at the outset of the case. See pages 6-7, *supra*.

Thus, while a *qui tam* relator possesses a personal stake in the outcome of his suit, Congress employed the *qui tam* mechanism to further the important *public* interest in redressing and deterring acts of fraud against the government. Of course, suits for compensatory relief brought by individual victims of unlawful conduct may themselves serve larger public interests. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (backpay award under Title VII of the 1964 Civil Rights Act serves a "prophylactic" purpose because "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality"). But providing compensation to actual victims has traditionally been regarded as an end in itself. See *id.* at 418 ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination."). By contrast, the monetary awards authorized by 31 U.S.C. 3730(d)(1) and (2) rest solely on Congress's pragmatic determination that private enforcement efforts will ultimately serve the *government's* interest in increasing its total FCA recoveries and deterring the submission of false claims—not on any notion that private persons who have information concerning fraud against the government have a "right" to be paid for that information.²⁴

²⁴ As the Court observed in *Hughes Aircraft*, *qui tam* provisions are

2. The Property Clause of the Constitution states:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. Const. Art. IV, § 3, Cl. 2. Although the principal significance of the Property Clause has lain in its broad grant of authority over land owned by the United States, particularly the Territories, the powers that the Clause vests in Congress are not limited to real property. As Justice Story explained, Congress's authority under the Property Clause "is not confined to the territory of the United States," but "may be applied to the due regulation of all other personal and real property rightfully belonging to the United States."

passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.

520 U.S. at 949. Citing the government's brief in *Hughes Aircraft*, petitioner contends (Br. 44) that "[t]he United States itself acknowledges that the relator does not act on behalf of the United States, but instead acts in a private capacity." We argued in *Hughes Aircraft*, and we continue to believe, that the relator is properly characterized as a "private" party rather than as an "Officer of the United States." Congress chose to employ the *qui tam* mechanism, however, not because it regarded the enrichment of relators as an end in itself, but because it believed that relators' self-interested pursuit of personal gain would ultimately serve important governmental interests. A *qui tam* suit under the FCA is thus "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-573 (1992) (emphasis added).

Joseph Story, *Commentaries on the Constitution of the United States* 478 (Ronald D. Rotunda & John E. Nowak eds., 1987).

Congress "has the exclusive right to control and dispose of" the property of the United States, "and no State can interfere with this right, or embarrass its exercise." *Van Brocklin v. Tennessee*, 117 U.S. 151, 168 (1886). This Court has held that "[t]he power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.'" *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). It could hardly have escaped the Framers' attention that the protection and disposition of property frequently involves resort to judicial proceedings. In ratifying the Constitution, the States therefore necessarily consented to Congress's use of appropriate judicial mechanisms for carrying into effect its authority over federal property. Congress's authority to utilize the courts for that purpose surely includes the power to employ an enforcement mechanism, such as the *qui tam* action, that was well-accepted by the founding generation as a means of collecting monetary obligations owed to the government.

To construe the Eleventh Amendment as barring *qui tam* suits against state agencies would interfere, in two distinct senses, with Congress's authority over "Property belonging to the United States." First, and most obviously, a State's submission of a "false or fraudulent claim for payment or approval" (31 U.S.C. 3729(a)(1)) is itself a direct threat to congressional control over federal property: the FCA serves both to safeguard the integrity of the public fisc and to ensure that federal resources are ultimately used in the manner prescribed by Congress. Recognizing that the government lacks the resources to detect, investigate, and pursue every instance of fraud against the United States, see 1986 Senate Report 7-8, Congress provided a financial incentive for private relators to supplement the govern-

ment's efforts. The bar on *qui tam* suits against state defendants that petitioner advocates is objectionable not because it would deprive potential relators of their "right" to a monetary recovery, but because it would disable Congress from using what it believed to be the most efficacious means of protecting the property of the United States. Such a barrier would subvert rather than protect "the fundamental constitutional balance between the federal government and the States." *Atascadero*, 473 U.S. at 238.²⁵

In addition, the United States' chose in action against a State or state agency that has knowingly submitted a false claim is itself a species of property that may, under ordinary principles of property law, be assigned to a private party. Compare *Spiller v. Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117, 135 (1920) ("A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty but for compensation, is a property right assignable in its nature, and must be regarded as assignable at law, in the absence of a legislative intent to the contrary.") (citations omitted); *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 439-441 (1951) (a chose in action is a form of intangible property that can escheat to the

²⁵ This Court's Eleventh Amendment decisions have emphasized the States' substantial interest in controlling the manner in which their financial obligations to private parties will be determined and enforced. See, e.g., *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 465 (1945); *Great N. Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *Hans v. Louisiana*, 134 U.S. 1, 16 (1890). That concern is not implicated by the FCA's *qui tam* mechanism, the purpose of which is to determine and enforce the defendant's obligation to the federal government. The fact that a portion of any *qui tam* recovery goes to the relator does not alter the constitutional analysis. The process of recovering money owed to the United States inevitably requires the expenditure of federal funds, both in the form of wages to the government's own employees and in the form of payments to private parties. The relator's share of a *qui tam* recovery is simply an expense incurred by the federal government in the course of recouping money owed to it.

State); *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997) ("In general, claims or choses in action may be freely transferred or assigned to others."). The statutory authorization for *qui tam* suits operates in practical effect as a partial assignment of the United States' chose in action to the private party who first files suit. See *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) (FCA "effectively assigns the government's claims to *qui tam* plaintiffs"), cert. denied, 510 U.S. 1140 (1994).²⁶ If the Eleventh Amendment is construed to bar *qui tam* suits against state defendants, then Congress is effectively precluded from assigning the government's chose in action, in derogation of its authority under Article IV to dispose of property belonging to the United States.

B. The United States Retains Significant Incidents Of Control Over *Qui Tam* Suits Under The FCA, Thereby Insuring Ultimate Political Accountability For Such Suits

This Court explained in *Alden* that the essential feature of suits brought by the United States is that they "require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue unconsenting States."

²⁶ The judgment in a *qui tam* suit has traditionally been given preclusive effect in a subsequent action brought by the government. See note 1, *supra* (Blackstone explains that "the verdict passed upon the defendant in the first [*qui tam*] suit is a bar to all others, and conclusive even to the king himself"). Although the text of the FCA does not address the question directly, the legislative history of the 1986 amendments reflects Congress's understanding that the traditional preclusion rule would apply. See 1986 Senate Report 27 ("if the Government declines to intervene in a *qui tam* action, it is estopped from pursuing the same action administratively or in a separate judicial action"). The applicable preclusion rule reinforces the fact that the effect of the FCA's *qui tam* provisions is to assign to the relator the government's cause of action.

119 S. Ct. at 2267. That requirement is satisfied here. Even before a *qui tam* complaint is served upon the defendant, it must be served upon the government, which has an absolute right to intervene to take over the suit. 31 U.S.C. 3730(b)(2). A *qui tam* suit cannot go forward if the government objects, see pages 6-7 & note 5, *supra*, and it likewise cannot be dismissed or settled over the government's objection. See 31 U.S.C. 3730(b)(1) (*qui tam* suit "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting"); *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 156-158 (5th Cir. 1997); note 4, *supra*; but see *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720-724 (9th Cir. 1994).

Every *qui tam* suit that proceeds without government intervention has therefore survived scrutiny by the United States, which has declined to exercise its power to dismiss the case or to take an active role in the litigation; the United States at all times retains the power to intervene. Thus, the dissenting judge in the court of appeals was simply mistaken in suggesting (Pet. App. 72-85) that a *qui tam* suit is insulated from the judgment of politically accountable officials. Although a *qui tam* relator is not himself politically accountable, he cannot proceed over the objection of the Attorney General, who is "entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed.'" *Alden*, 119 S. Ct. at 2267 (quoting U.S. Const. Art. II, § 3).

In this respect, *qui tam* suits for defrauding the United States are utterly unlike the suits brought by state employees for back wages in *Alden*, or the suits brought by Alaskan native villages for funding pursuant to state statute in *Blatchford v. Native Village*, 501 U.S. 775, 782 (1991). In neither of those cases was the private plaintiff subject to the control of the United States as is a *qui tam* relator. And that difference in control is related to the difference in the interests at stake. Because a *qui tam* suit under the FCA is brought to redress an injury done to the United States, and

the bulk of any recovery goes to the United States, the suit is appropriately subject to the control of the federal government—unlike the suit for back wages brought by the employees in *Alden*, or the *Blatchford* plaintiffs' attempt to obtain funds allegedly due them under state law.

C. The Application Of Eleventh Amendment Principles Characteristically Turns On An Examination Of The Interests At Stake In A Particular Suit

As we explain above, the FCA's *qui tam* provisions are a means by which Congress sought to redress and deter acts of fraud against the federal government. This suit is therefore fundamentally different from the cases on which petitioner relies, which uniformly involve allegations of legal wrong done to private parties. The thrust of petitioner's argument is that the relator's private status is dispositive of the Eleventh Amendment inquiry, regardless of the interests that the FCA's *qui tam* provisions are intended to serve. That theory is inconsistent with this Court's precedents. In a variety of contexts, this Court has made clear that application of state sovereign immunity principles turns on the nature of the interests affected by a particular suit or category of suits.

1. The determination whether a particular case involves a suit "against one of the United States" depends not simply on the identity of the nominal defendant, but upon the relationship between that defendant and the State, and upon the practical consequences that the litigation (if successful) will entail. The Court has repeatedly held that

the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945) (citation omitted); see also, e.g., *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"). The Court undertakes a similar functional analysis in determining whether a particular state instrumentality is an "arm of the State" that may invoke the State's Eleventh Amendment immunity. See, e.g., *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429-431 (1997).

2. The States, "pursuant to the plan of the Convention," consented to suits by other States. *Alden*, 119 S. Ct. at 2267; accord, e.g., *Blatchford v. Native Village*, 501 U.S. 775, 782 (1991); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-329 (1934). The Court has made clear, however, that a State's presence as a named plaintiff is not a sufficient basis for permitting such suits to go forward. Thus, in *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), the Court held that suits brought in the names of the States of New Hampshire and New York, seeking to collect on bonds and coupons issued by the State of Louisiana, were barred by the Eleventh Amendment. *Id.* at 88-91. Although the private bond and coupon holders had formally assigned their claims to the plaintiff States in conformity with those States' laws, this Court found that the plaintiff States and their officers were "only nominal actors in the proceeding," since the proceeds of the suits would flow entirely to the private parties. *Id.* at 88-89.

In *South Dakota v. North Carolina*, 192 U.S. 286 (1904), by contrast, a private bond holder donated his bonds outright to the State of South Dakota. The Court observed that there could be no "question respecting the title of South Dakota to these bonds," since "[t]hey [we]re not held by the State as representative of individual owners, * * * for they were given outright and absolutely to the State." *Id.* at 310

(citing and distinguishing *New Hampshire v. Louisiana*, *supra*). The Court concluded on that basis that the suit was properly regarded as "an action brought by one State against another to enforce a property right" and was therefore permitted to go forward. *Id.* at 318; see *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-393 (1938) (discussing *New Hampshire* and *South Dakota*). Thus, the question whether a suit has been brought *by* a State, like the question whether it has been brought *against* a State, is resolved by reference to the suit's practical effect on the State's interests.

3. A suit against a government officer in his official capacity "generally represent[s] only another way of pleading an action against the entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)); see also *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269-270 (1997). Consistent with that principle, the Court has held that official-capacity suits against individual state officers seeking retrospective monetary awards are barred by the Eleventh Amendment. See pages 43-44, *supra*. However, official-capacity suits arising under federal law and seeking prospective injunctive relief (commonly known as "*Ex parte Young* suits," see *Ex parte Young*, 209 U.S. 123 (1908)) are permitted to go forward, "notwithstanding the obvious impact on the State itself," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 (1984), that such relief entails.

The justification for the *Ex parte Young* rule is that private suits for prospective relief play a crucial role in ensuring the supremacy of federal law. "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst*, 465 U.S. at 105; see also *Alden*, 119 S. Ct. at 2263 (*Ex parte Young* rule reflects a determination "that certain

suits for declaratory or injunctive relief against state officers must * * * be permitted if the Constitution is to remain the supreme law of the land"). As the Court explained in *Green v. Mansour*, 474 U.S. 64 (1985):

Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

Id. at 68 (citations omitted). This Court's *Ex parte Young* jurisprudence confirms that even a private action that is in substance one against the State may proceed if it will serve sufficiently important *national* objectives.²⁷

²⁷ The original rationale for the rule announced in *Ex parte Young* was that a state official who behaves in an unconstitutional manner is thereby "stripped of his official or representative character," and that a suit to compel compliance with the Constitution is for that reason properly regarded as one against the individual officer rather than against the State. *Ex parte Young*, 209 U.S. at 160. The Court has since recognized, however, that in official-capacity suits the distinction between the officer and the State posited in *Ex parte Young* is essentially a fiction, see *Coeur d'Alene*, 521 U.S. at 269-270; *Pennhurst*, 465 U.S. at 114 n.25, and that the more persuasive justification for permitting suits for prospective relief to go forward is that they play a crucial role in ensuring the supremacy of federal law. See *Green*, 474 U.S. at 68; *Pennhurst*, 465 U.S. at 104-105; see also *Coeur d'Alene*, 521 U.S. at 293 (opinion of O'Connor, J.). The Court in *Pennhurst* held on that basis that the Eleventh Amendment bars an official-capacity suit against individual state officers seeking prospective relief on *state-law* grounds. 465 U.S. at 106-117. The Court observed that "the general criterion for determining when a suit is in fact one against the sovereign is the effect of the relief sought." *Id.* at 107. The Court declined to extend the *Ex parte Young* rule to state-law claims, explaining that "[i]n such a case the entire basis for the doctrine of *Young* * * * dis-

Like a *qui tam* relator, the plaintiff in an *Ex parte Young* suit will have a personal stake in the case (else he would lack Article III standing) and will presumably conduct the litigation in a self-interested manner. The premise of this Court's *Ex parte Young* jurisprudence is that such suits should nevertheless be allowed to go forward because the plaintiffs' pursuit of their own self-interest will (at least in the aggregate) ultimately serve the national interest in ensuring the supremacy of federal law. The FCA's *qui tam* provisions similarly reflect Congress's considered judgment that private relators' pursuit of personal financial gain will further quintessentially national objectives.

4. The Court in *Alden* indicated that Congress could validly authorize federal officials to file suit against a State to obtain retrospective monetary relief for state employees injured by violations of the Fair Labor Standards Act (FLSA). See 119 S. Ct. at 2269.²⁸ The Court held, however,

appears," because "[a] federal court's grant of relief against state officials on the basis of state law * * * does not vindicate the authority of federal law." *Id.* at 106.

²⁸ Federal officials may properly be authorized to file suit to enforce federal civil and criminal laws, regardless of whether the government as a corporate body has a pecuniary or similarly tangible interest in the outcome of the suit. See, e.g., *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132-133 (1995); *INS v. Chadha*, 462 U.S. 919, 931 (1983); *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459-460 (1940); *Coleman v. Miller*, 307 U.S. 433, 441-442 (1939); *In re Debs*, 158 U.S. 564, 584-586 (1895); cf. *Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute."). That principle serves to distinguish the hypothetical Labor Department enforcement action discussed in *Alden* from the suit in *New Hampshire v. Louisiana*. The claim in that case was that Louisiana had breached its obligations under bonds and coupons that it had issued; New Hampshire did not (and presumably could not) assert that the case implicated its sovereign interest in the enforcement of its own legal code. Because New Hampshire had neither a sovereign nor a proprietary interest in the proceeding, the suit was in substance one by the private bond and coupon holders, and it was therefore barred by the Eleventh

that Congress could not properly confer the authority to sue upon the employees themselves. The Court explained:

The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.

Ibid.

That passage does not suggest that the participation of a federal officer is an absolute prerequisite to the maintenance of any suit against a State. To the contrary, the passage is in terms a comparison between two different methods of *enforcing the FLSA*. The gravamen of an FLSA suit is a claim of legal wrong done to individual employees, and the relief requested is an award of money to those private parties. In that context, the Court in *Alden* found the participation of a constitutional officer to be necessary to ensure that the federal interests involved in a particular case are sufficiently important to justify subjecting the State to suit. By contrast, the FCA's *qui tam* mechanism was established by Congress as a means of vindicating quintessentially *national* interests. Because the gravamen of an FCA suit is an allegation of wrong done to the United States as a corporate body, and because the United States is the principal beneficiary of any successful action, the suit retains its

Amendment. By contrast, a Labor Department FLSA enforcement action would further the federal government's sovereign interest in the enforcement of its own law, even if the monetary relief flowed entirely to the aggrieved employees. *Cf. General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").

fundamental public character regardless of whether it is brought by the government or by a *qui tam* relator.²⁹

Moreover, the government retains significant prerogatives in a *qui tam* suit under the FCA. The government may intervene, at the outset of the suit or later, either to prosecute or to dismiss the action. See pages 6-7, 41-43, *supra*. The Act also provides that a *qui tam* suit "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. 3730(b)(1); see note 4, *supra*. Insofar as it permits the relator to go forward absent affirmative government action to take control of the suit, the FCA reflects a congressional determination that *qui tam* suits will presumptively serve the interests of the United States. Federal officials retain ample authority, however, to protect the national interest if they believe that interest to be threatened by a particular *qui tam* action.

²⁹ Petitioner's reliance (Br. 31-32) on *Blatchford* is misplaced for the same reason. The plaintiff Tribes in *Blatchford* alleged an injury to themselves and sought an order requiring the State to pay them money. 501 U.S. at 778. The case did not involve an allegation of wrong done to the United States as a corporate body, nor would any of the requested monetary relief have flowed to the federal treasury.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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APPENDIX

1. The Property Clause of the United States Constitution, Article IV, Section 3, Clause 2, provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

2. The Eleventh Amendment to the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. Section 3729 of Title 31, United States Code, provides in pertinent part:

(a) LIABILITY FOR CERTAIN ACTS.—
Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

* * * * *

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which

(1a)

the Government sustains because of the act of that person.

4. Section 3730 of Title 31, United States Code, provides in pertinent part:

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.— (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

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No. 98-1828

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In The
Supreme Court of the United States

STATE OF VERMONT AGENCY
OF NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL.
JONATHAN STEVENS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The relator's actions exemplify why "the National Government must itself deem the case of sufficient importance" so as to justify overriding Vermont's fundamental sovereign right not to be subject to suit. *Alden v. Maine*, 119 S. Ct. 2240, 2269 (1999). A private individual, nominally on behalf of the United States, is seeking relief that would undoubtedly impair Vermont's ability to protect the public health and environment. He has alleged that the Department of Environmental Conservation, Vermont's equivalent to EPA, fraudulently obtained grant monies from EPA. He has asserted a claim for civil penalties of "between \$12.5 million and \$25 million" – a considerable sum which still "do[es] not include a calculation of [any] actual damages, which would be trebled." Relator's Lodging 9.

The magnitude of the relator's requested relief is plainly revealed by comparing it to DEC's total annual operating costs. In fiscal year 1994, (July 1, 1993 – June 30, 1994) DEC's entire operating budget was \$18,210,905. 1993 Vt. Acts & Resolves No. 60, §§ 193-205. Notwithstanding the enormity of the relator's claim, EPA, who with the Department of Justice, investigated the claims thoroughly and interviewed the pertinent DEC employees mentioned in the relator's Lodging, concluded that Vermont did nothing wrong. Vt. Br. App. 1-3.

This lawsuit's potential impact on Vermont is staggering. See *Alden*, 119 S. Ct. at 2264. Yet, the United States chose neither to sue Vermont, nor to pursue Vermont with the decidedly severe remedy of the False Claims Act. Rather, a private person driven by the hope of monetary gain is pursuing this matter in the name of the United States and seeks to assert its sovereign authority to sue the State of Vermont.

There is no plausible basis for concluding that Congress intended the FCA to be used in this manner. Moreover, the Constitution requires that the United States itself exercise what it concedes to be "the essential feature of suits brought by the United States" against a State, *i.e.*, political responsibility for each suit it prosecutes against a State. U.S. Br. 41 (citing *Alden*, 119 S. Ct. at 2267). Given what is at stake for Vermont, the exercise of political responsibility is imperative.

I. STATES ARE NOT "PERSON" DEFENDANTS UNDER THE FCA.

Respondents suggest that this Court should ignore the plain meaning of the term "person," the clear statement rule, and the doctrine of constitutional doubt simply to avoid a holding that prevents the United States – as well as private relators – from bringing suit against a State under the FCA. This argument is misdirected. Neither this case, nor the FCA itself, is primarily concerned with the ability of the United States to sue a State for fraud. The hyperbole contained in respondents' briefs should not distract the Court's attention from the central question of statutory interpretation in this case: did Congress, by its use of the generic term "person" to define the class of potential defendants under the FCA, plainly state its intent to authorize suits against the sovereign States under that statute? In light of this Court's precedents, the answer to that question is "no."

A. The Court has jurisdiction to consider the statutory issue.

This Court's decision in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), did not preclude the exercise of pendent appellate jurisdiction where issues are "inextricably intertwined" or where review of another issue is

"necessary to ensure meaningful review" of the issue on appeal. *Id.* at 50-51. In this case, review of the statutory issue is plainly appropriate under *Swint* and other decisions of the Court. As the United States recognizes, the proper interpretation of the FCA is "logically antecedent" to the constitutional issue raised here. U.S. Br. 17, n.9. The Court has repeatedly recognized its inherent authority to consider issues "'antecedent to . . . and ultimately dispositive of' the dispute before it," even where those issues are not properly raised. *United States Nat'l Bank v. Independent Ins. Agents*, 508 U.S. 439, 447 (1993) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)); see also *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 381-82 (1995) (Amtrak's status as government entity was "prior question" properly considered by Court, in part to avoid making assumptions that may prove incorrect).

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court recognized that whether Congress intended to abrogate state sovereign immunity is necessarily antecedent to the issue of Congress's authority to do so. There, the State of Florida took an interlocutory appeal of the district court's ruling that the Tribe's suit did not violate sovereign immunity. *Id.* at 52. This Court held that it must look first to the relevant statute to determine whether Congress intended to abrogate state sovereign immunity, before considering the constitutional question. *Id.* at 55-56.

Ironically, the relator's discussion of the jurisdictional issue itself reveals the degree to which the Eleventh Amendment issue and the antecedent question of statutory interpretation are "inextricably intertwined." The relator argues that the Court should rule on the Eleventh Amendment issue based on "the assumption that States are 'persons' under the False Claims Act." Rel. Br. 39. The relator thus suggests that the Court ignore the

usual principles that guide the Court's decisionmaking, including avoiding constitutional issues when possible, see, e.g., *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1998), and declining to issue advisory opinions. See, e.g., *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). But the argument is also an implicit concession that the meaning of the term "person" in the FCA is a "prior question" that must be resolved before the Court addresses the Eleventh Amendment issue. Cf. *Lebron*, 513 U.S. at 382.

B. Interpreting the FCA to exclude States as defendants does not undermine the United States' ability to combat fraud.

The United States maintains that States must be included under the FCA because the FCA is the government's "primary vehicle" for redressing fraud. U.S. Br. 17. This reasoning is specious, however, because interpreting the FCA to exclude suits against the States in no way "preclude[s] the Attorney General from seeking redress . . . for fraud committed by States and state agencies." *Id.* at 23. The States are not immune from suits brought by the United States under the proper control of responsible federal officers and there is thus no barrier to a suit by the United States against a State sounding in common law fraud, unjust enrichment or related principles. Indeed, the United States itself apparently recognizes this avenue for relief, as it asserted such claims in a recent case against the City and State of New York. See *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 345 (S.D.N.Y. 1998). As discussed in Vermont's opening brief and the brief of the Amici States, the federal government also has numerous administrative remedies for noncompliance with grant programs. Vt. Br. 35-36; Br. of Amici Curiae States 16-17; see also Pet. App. 79-82 (Weinstein, J., dissenting). Should these remedies

prove inadequate, Congress is of course free to amend the FCA to permit the United States itself to bring suit against a State under the Act.

Moreover, the United States' own statistics reveal that the FCA is not the "primary vehicle" for redressing frauds committed by state and local governments. According to statistics provided to Vermont by the United States, from 1986 to 1997 the United States pursued only nine *qui tam* suits filed against state and local entities.

The small scale of the problem and the other remedies available to the United States fatally undermine its assertion that "it would be anomalous to exclude the States from the Act's coverage." U.S. Br. 12. By excluding the States as potential defendants under the FCA, Congress did not give license to the States to commit rampant fraud against the federal government. Congress merely exempted state taxpayers from an admittedly onerous statute that permits private individuals to bring suit for treble damages, penalties, attorney's fees, and costs.

Congress's decision is not surprising. In fact, the same Congress that enacted the 1986 amendments to the FCA also specifically excluded the States from coverage under the Program Fraud Civil Remedies Act (PFCRA), a less punitive statute than the FCA that authorizes the United States to pursue administrative penalties and assessments for false claims. See 31 U.S.C. § 3801(a)(6) (defining "person" as "any individual, partnership, corporation, association, or private organization"). Given the normally cooperative nature of federal-state relations and the other remedies available to the United States in the rare case of fraud by a State, it is entirely understandable that Congress excluded States from liability under both the FCA and the PFCRA.

- C. The plain meaning of the term "person," the clear statement rule, and the doctrine of constitutional doubt lead inescapably to the conclusion that States are not "person" defendants under the FCA.

In an attempt to avoid the established rules of statutory construction that apply to the FCA, respondents cite the portion of the decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which the Court concluded that Congress intended to impose liability on States for money damages under CERCLA. *Id.* at 13. *Union Gas* has no bearing on the meaning of the undefined term "person" in the FCA because, as the Court emphasized, "'States' are explicitly included within [CERCLA's] definition of 'persons.'" *Id.* at 7 (emphasis added). What is perhaps most interesting about this point is that although CERCLA specifically included States as "persons," four justices nonetheless concluded that the statute did not contain a sufficiently clear statement of Congress's intent to impose liability on the States. *Id.* at 50 (White, J., concurring in part and dissenting in part).

In any event, neither *Union Gas* nor any other case cited by respondents contravenes the "ordinary rule of statutory interpretation" set out in *Will v. Michigan*, 491 U.S. 58 (1989): in common usage, the term "person" does not include the States, and construing a statute in light of this common usage is "particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." *Id.* at 64. Exposing States to the FCA's punitive remedies, including treble damages and substantial civil penalties, is precisely the type of burden or liability that, under *Will*, precludes interpreting "person" to include the States.

Respondents further cite *Union Gas* for the unexceptional proposition that "there are no special rules dictating when [States] may be sued by the Federal Government, nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits." 491 U.S. at 11. That proposition is simply not relevant to the FCA. The Court in *Union Gas* rejected Pennsylvania's argument that CERCLA only authorized suits by the United States against States, reasoning that CERCLA's "highly specific language" regarding States would have been unnecessary to authorize such suits. *Id.* at 12. But, because CERCLA authorized suits by both the United States and private individuals, Congress was required to use specific language to satisfy the clear statement rule. *Id.* at 11-12. The same is true here: because the FCA, like CERCLA, authorizes suits by both the United States and private individuals, the Court must determine whether Congress has clearly stated its intent to subject States to suit.

The potential for enormous awards of civil penalties and treble damages under the FCA provides an independent basis for applying the clear statement rule to the statute. Such punitive remedies are inconsistent with government liability, and have the potential to impose unprecedented liability on the States.¹ *Cf. City of Newport*

¹ The United States concedes that the treble damages and civil penalties currently available under the FCA may "exceed the amount necessary to compensate the government for the losses it incurs." U.S. Br. 33. The United States complains, however, that Vermont is attempting to avoid "even the component of its potential FCA liability" that is compensatory. *Id.* at 32-33. This argument is baffling, to say the least. With a narrow exception, if liability is established, treble damages and civil penalties of at least \$5000 per claim are mandatory under the FCA. 31 U.S.C. § 3729(a). The United States itself may,

v. Fact Concerts, Inc., 453 U.S. 247, 261-63 (1981) (describing historical governmental immunity from punitive damages, including exemplary or treble damages). This Court has held that Congress must plainly state its intent to subject States to new liabilities on this scale, reasoning that Congress would not "implicitly attempt to impose massive financial obligations on the States." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). This reasoning applies with equal force to the FCA.

In short, respondents simply cannot avoid the plain meaning of the term "person," the clear statement rule and the doctrine of constitutional doubt by erroneously characterizing the FCA as a statute that merely "grants a right of action to the United States." Rel. Br. 42. Subjecting States to suit under the FCA raises serious constitutional concerns, both because of the burdens the statute imposes and the right of action it grants to private persons. These established rules of statutory construction demonstrate that States are not potential defendants under the FCA. See Vt. Br. 10-17.

D. No provision of the FCA "unambiguously" imposes liability on the States.

Respondents' principal claims with respect to the statutory language and legislative history are fully addressed in Vermont's opening brief. Vt. Br. 18-29. Two points merit separate attention here. First, the relator's claim that, by using the term "any" to modify "person," Congress "unambiguously" imposed liability on the States, Rel. Br. 45, is easily rebutted. This Court addressed similar language in *Will*, and concluded that the phrase

of course, seek compensatory damages by pursuing administrative or common-law remedies.

"every person" in 42 U.S.C. § 1983 does not include the States. *Will*, 491 U.S. at 65.²

Second, respondents attempt to bolster their unpersuasive statutory argument by insisting that, because Congress re-enacted 31 U.S.C. § 3730 in full in 1986, the Background Statement in the 1986 Senate Report (S. Rep. No. 345, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 5266) is an authoritative source of legislative history as to the meaning of the term "person" in that section. Of course, references in legislative history, as contrasted with clear statutory language, cannot satisfy the clear statement rule. See *Will*, 491 U.S. at 65. Moreover, the 1986 Congress retained the term "person" – the same word used to describe the class of potential defendants under the Act since 1863. There is absolutely no suggestion, in either the text of the amendments or the legislative history, that Congress intended to change the meaning of the term "person." Not surprisingly, respondents ignore *Pierce v. Underwood*, 487 U.S. 552, 566 (1988), in which the Court rejected a strikingly similar use of legislative history. See Vt. Br. 26-27.

Respondents do acknowledge that the drafters of the Report may have been mistaken about the meaning of the term "person" prior to the 1986 Amendments. Rel. Br. 47-48; U.S. Br. 29-30 & n.18. Their argument is thus reduced to the following: although Congress mistakenly believed it was not expanding the coverage of the FCA in 1986, this Court should nonetheless rely on an incorrect statement in the historical background section of a committee report to conclude that Congress's continued use of the term "person" in § 3730 signaled an unspoken

² The 1863 Act similarly applied to "any person not in the military or naval forces." Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, § 3.

intent to include the States as potential defendants under the statute. This convoluted use of legislative history – which is entirely inconsistent with *Pierce* – is woefully insufficient to show that Congress clearly intended to alter the ordinary meaning of the term “person” and impose liability on the States under the FCA.

II. THE FCA’S QUI TAM PROVISIONS VIOLATE THE ELEVENTH AMENDMENT.

The starting point for assessing whether a private person may sue a State “for the person and for the United States Government,” 31 U.S.C. § 3730(b)(1), is the plan of convention. One day before the Court granted Vermont’s petition for certiorari, this Court provided a remarkably apt analysis of the nature of the States’ consent to suit by the Federal Government pursuant to the plan of convention. In language that directly addresses the issue presented here, the Court recognized that “[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the nation.” *Alden*, 119 S. Ct. at 2263. *Alden* reconfirmed that the States’ “consent ‘inherent in the convention’ to suit by the United States – at the instance and under the control of responsible federal officers – is not consent to suit by anyone whom the United States might select” *Blatchford v. Native Village*, 501 U.S. 775, 785 (1991). “A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to ‘take Care that the Laws be faithfully executed,’ U.S. Const., Art. II, § 3, differs in kind from the suit of an individual.” *Alden*, 119 S. Ct. at 2267. Therefore, “[s]uits brought by the United States itself require the exercise of political responsibility

for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.” *Id.*

The relator is not entrusted with any constitutional duties. Nor is his decision to commence and prosecute this matter an exercise of the United States’ political responsibility. Indeed, the United States concedes that “[t]o be sure . . . , the *qui tam* relator himself is a private party.” U.S. Br. 34. “Unlike a public official conducting litigation on behalf of the government, the relator has a personal financial stake in the suit.” *Id.* at 36. As the Court recently recognized, “[a]s a class of plaintiffs, *qui tam* relators are different in kind from the Government. They are motivated primarily by prospects of monetary reward rather than the public good.” *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). In short, this matter “differs in kind,” *Alden*, 119 S. Ct. at 2267, from a suit commenced and prosecuted by the United States and is therefore barred by the Eleventh Amendment.

Dismissing *Alden* and *Blatchford* as mere dicta, and skipping entirely over any meaningful discussion of the plan of convention and the respect accorded the States therein, respondents argue that a private person can sue a State so long as the United States is a “real party in interest.” The United States claims to be a real party in interest because it “is the principal beneficiary of any successful action” and retains “incidents of control” over this matter. Respondents, however, eschew any need for the United States’ actual responsibility or control over this matter. Rel. Br. 20; U.S. Br. 42-43.

Respondents also argue that the FCA is an exercise of Congress’s powers under the Property Clause, U.S. Const. art. IV, § 3, cl. 2, because the FCA generically “assigns” a potential “chase in action” from the United

States to the universe of potential relators. U.S. Br. 38-41. They claim that the Property Clause somehow allows Congress to authorize private persons to sue States.

A. The real-party-in-interest analysis is inappropriate.

Respondents' real-party-in-interest argument stems from an asserted analogy to state sovereign immunity cases: "application of state sovereign immunity principles turns on the nature of the interests affected by a particular suit or category of suits." U.S. Br. 43. Respondents' reliance on the real-party-in-interest analysis is misplaced for several reasons.

1. Respondents' search for an analogy is unnecessary because the *Blatchford/Alden* requirements specifically determine whether the United States is the plaintiff in a suit brought against a State. Those decisions require the Federal Government's exercise of political responsibility and control. The real-party-in-interest test does not determine the existence of these controls. The bare assumption that the relator is protecting the Federal Government's interests does not imbue him with the political accountability of an officer of the United States. See *Alden*, 119 S. Ct. at 2267. Rather, it demonstrates a delegation of the United States' authority – a delegation that, under *Blatchford*, is unconstitutional. 501 U.S. at 785.

Respondents' reliance on the real-party-in-interest test cannot be reconciled with *Alden*. *Alden* recognized the propriety of a suit "by the United States on behalf of the employees." 119 S. Ct. at 2269; see also *United States v. Minnesota*, 270 U.S. 181, 193-95 (1926) (United States may sue State on behalf of Tribe). In such instances, the employees or tribes, as opposed to the United States, could be construed as real parties in interest. However, the determinative inquiry is whether the "rule that the

National Government must itself deem the case of sufficient importance to take action against the State" has been satisfied. *Alden*, 119 S. Ct. at 2269. Otherwise, the suit is not one to which the States have consented. *Id.*

2. Respondents' reliance on the real-party-in-interest test undermines the Eleventh Amendment's fundamental purposes.

The Eleventh Amendment does not exist solely in order to preven[t] federal-court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.

Seminole, 517 U.S. at 58 (internal quotation marks and citations omitted). The real-party-in-interest test protects the state fisc by determining if the State is the effective defendant in a suit brought by a private person. *Edelman v. Jordan*, 415 U.S. 651, 663-64 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Using this test to justify suits directly against States by private persons motivated, not by the public good, but by "the strong stimulus of personal ill will or the hope of [monetary] gain," *Hughes*, 520 U.S. at 949 (internal quotation marks omitted), is flatly inconsistent with protection of the States' treasuries.

The relator also attempts to justify his reliance on the real-party-in-interest test by arguing that there will be no recovery if the United States has not been injured. Rel. Br. 24-25. However, the States' sovereign immunity is immunity, not just from damages, but from suit. *Seminole*, 517 U.S. at 58. When, after discovery and trial, it is determined that the United States has not been injured, the State's sovereign immunity will have been lost and the State will have been subjected to the indignity and coercive process of a judicial tribunal at the instance of a

private person. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993).

3. None of the cases cited by respondents support the notion that an individual may sue a State if the United States is also a mere party in interest. To the contrary, *New Hampshire v. Louisiana*, 108 U.S. 76 (1883) – the case central to respondents’ real-party-in-interest theory – held that the lawsuit in that case was “in legal effect commenced” by private persons, and “while the suits are in the names of the states, they are under the *actual control* of individual citizens, and are prosecuted and carried on altogether by and for them.” *Id.* at 89 (emphasis added). While this matter is nominally brought in the name of the United States, no one contends that it is under the “actual control” of the United States, nor does anyone contend that the relator is prosecuting this case for any reason other than his own personal stake in the matter. In short, respondents’ reliance on *New Hampshire v. Louisiana* is strikingly misguided because that case stands for the proposition that private citizens in actual control of a suit cannot use sovereign authority to circumvent a State’s Eleventh Amendment protections.

4. If one is to resort to a test other than *Alden*’s specific requirements, the arm-of-the-state test offers a better approach than the real-party-in-interest test. Here, the relator argues that he is under the umbrella of the United States’ sovereign authority to sue a State free from Eleventh Amendment limitations. The arm-of-the-state test determines whether a person is sufficiently tied to a sovereign to invoke such sovereign authority. *Alden*, 119 S. Ct. at 2267; *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-02 (1979) (bi-state planning agency not arm of the state protected by Eleventh Amendment). Consistent with *Alden*, the arm-of-the-state test essentially requires that the sovereign be responsible

for and in control of the person asserting sovereign authority. *Tahoe*, 440 U.S. at 400-02.

B. The United States does not control this suit.

The relator makes the remarkable assertion that “his presence [in this matter] does not expand the claims before the Court.” *Rel. Br.* 33. His assertion stands in sharp contradiction with the fact that he chose to sue the State of Vermont; he framed the cause of action; and he chose the remedy that is being pursued. The United States had absolutely no control over these decisions. *See* 31 U.S.C. § 3730(b)(1). Were it not for the relator, this matter would not exist.

Respondents nonetheless argue that the relator’s commencement and prosecution of this matter satisfies *Alden* because the United States retains unexercised “incidents of control.” U.S. Br. 41. *Alden*, however, turned on the Court’s recognition that a suit commenced and prosecuted by an individual “differs in kind” from a suit commenced and prosecuted by responsible federal officers. 119 S. Ct. at 2267; *see also Blatchford*, 501 U.S. at 785-86. The theoretical possibility that the United States could intervene in a suit framed, commenced, and prosecuted by a private individual does not convert the suit into one that “is commenced and prosecuted by those entrusted with the constitutional duty to ‘take care that the Laws be faithfully executed.’” *Alden*, 119 S. Ct. at 2267 (quoting U.S. Const. art. II, § 3). A private person “with different incentives,” *Hughes*, 520 U.S. at 950, from those of the United States brought this suit against Vermont without regard to the “rule that the National Government must itself deem the case of sufficient importance to take action against the State.” *Alden*, 119 S. Ct. at 2269. This private person will exercise his right

to conduct the litigation pursuant to his desire to further his private interests, not the public good.

The United States' submission does not remotely suggest that it will take any action to halt this affront to Vermont's sovereign dignity. Rather, the specific "incidents of control" identified by the United States demonstrate that it will merely sit on the sidelines and hope to collect its share of the nuisance value this lawsuit might garner from Vermont. For example, the United States claims "an absolute right to intervene to take over the suit" and asserts that this case can neither go forward nor be dismissed or settled over the Federal Government's objection. U.S. Br. 42, *but see Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990) ("Once the United States formally has declined to intervene in an action . . . little rationale remains for requiring consent of the Attorney General before an action may be dismissed."). Here, however, the United States waived its right to intervene and can now do so only upon a showing of good cause and without limiting the relator's status and rights. 31 U.S.C. § 3730(c)(3). Moreover, any settlement or dismissal would be at the instance of the relator and the defendant. The United States would merely proffer its subsequent consent or objection. In short, each of these so-called "incidents of control" are after-the-fact prerogatives that do not meaningfully constrain relators.

Further, the United States' subsequent intervention, motion to dismiss, settlement, and any restriction on the private person's participation in the action are all subject to the private person's objection and judicial review. 31 U.S.C. § 3730(c). The Court should not assume that the United States' requests will simply be rubber stamped by the lower courts. *Cf. Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (affirming strong presumption of

meaningful judicial review). Therefore, the controls mentioned by the United States rest not with the United States, but with the courts.

The United States also asserts that this matter survived "scrutiny by the United States, which has declined to exercise its power to dismiss the case or to take an active role in the litigation." U.S. Br. 42. What the United States does not argue is telling. It does not claim to have a policy of moving to dismiss claims that lack merit, are contrary to the United States' interests, or that should be pursued through avenues other than the FCA. In any event, this scrutiny was the prelude to the United States' inaction. The United States' inaction guarantees that this matter differs in kind from a suit brought and conducted by the United States because the FCA grants the relator "the right to conduct the action" that he framed and commenced. 31 U.S.C. § 3730(c)(3).

C. The Property Clause, like Article I, is subject to the Constitution's limitations on congressional authority.

1. Respondents' Property Clause argument is nothing more than a thinly disguised end run around *Alden* and *Seminole*. Indeed, the notion that a claim has been assigned to a private "citizen" should, in and of itself, answer the Eleventh Amendment inquiry here because a private citizen cannot sue a State. The crux of respondents' theory, therefore, is that the Property Clause allows Congress to circumvent constitutional limits on its Article I powers.³

³ Respondents provide no support for their theory that Congress enacted the FCA pursuant to the Property Clause. In fact, the 1863 Congress, seeking to address fraud in military spending, was acting pursuant to its Article I powers to

For example, the Fair Labor Standards Act allows the United States to sue an employer for damages, liquidated damages, and civil penalties. 29 U.S.C. § 216(c), (e). Civil penalties are paid to the United States. *Id.* Likewise, CERCLA allows for civil penalties and damages payable to the United States. 42 U.S.C. §§ 9609, 9607(a)(4)(A). Under respondents' theory, a claim for penalties or damages available under the FLSA or CERCLA is a "chose in action" that, under the Property Clause, could be assigned to a private person who could then sue a State nominally on behalf of the United States. Certainly, the landmark *Alden* and *Seminole* decisions are not subject to facile evisceration by the elevation of form over substance.

Respondents also fail to provide any principle for why the Eleventh Amendment "would interfere . . . with Congress's authority over 'Property belonging to the United States,'" U.S. Br. 39 (quoting U.S. Const. art. IV, cl. 2), but other constitutional limitations would not. Certainly, the Property Clause does not allow the United States to seize property allegedly belonging to the Federal Government in violation of the Due Process Clause

"provide for the common Defence and general Welfare" and "raise and support Armies." U.S. Const. art. I, § 8, cls. 1, 12; see also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943). Congress, of course, has vast authority under Article I, § 8 to stop and recoup fraudulent claims. What it does not have power to do under any article of the original Constitution is abrogate the States' protections embodied in the Eleventh Amendment. *Seminole*, 517 U.S. at 65-66 (14th Amendment is only recognized authority allowing Congress to abrogate the States' sovereign immunity). In any event, it would be anomalous for the Property Clause – a provision specific to management of the federal government's property – to provide Congress with greater authority to alter the federal-state balance of power than the vast and varied Article I powers.

and Congress cannot exclude persons from federal property based on race or religion. In sum, constitutional limitations on congressional powers do not "interfere . . . with Congress's authority over 'Property belonging to the United States.'" *Id.*

2. Respondents' reliance on the Property Clause assumes the ultimate question posed by the relator's allegations – it assumes that the allegedly defrauded grant monies are, in fact, property belonging to the United States.⁴ See U.S. Br. 39. Here, Vermont (with apparent support from EPA) has a claim to these funds, and the Property Clause provides that "nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. Const. art. IV, § 3, cl. 2 (emphasis added). Therefore, by its terms, the Property Clause does not allow Congress to circumvent the Eleventh Amendment rights of States,

Moreover, if Congress, pursuant to the Property Clause, acts to defeat a State's claim to property, such intent must be "definitely declared or otherwise made very plain" and "the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). As explained above and on pages 8-29 of Vermont's opening brief, Congress's intent to include States within the FCA's purview, if it exists, is neither plain nor affirmative. Therefore, the Property Clause does not allow Congress to circumvent the Eleventh Amendment.

⁴ Whether property, in fact, belonged to the United States was not at issue in any of the cases cited by respondents. See, e.g., *Ruddy v. Rossi*, 248 U.S. 104 (1918); *Light v. United States*, 220 U.S. 523 (1911). These cases only addressed the United States' dominion over property that unquestionably belonged to the United States.

CONCLUSION

The decision of the court of appeals should be reversed and this matter dismissed for want of jurisdiction.

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AUG 24 1999

No. 98-1828

CLERK OF THE SUPREME COURT

IN THE
Supreme Court of the United States

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.*
JONATHAN STEVENS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF *AMICI CURIAE* THE CITY OF NEW YORK,
THE CITY OF LOS ANGELES, THE CITY AND
COUNTY OF SAN FRANCISCO, AND COOK COUNTY,
ILLINOIS, IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI

The City of New York, the City of Los Angeles, the City and County of San Francisco, and Cook County, Illinois (collectively referred to as "amici") respectfully submit this brief as amici curiae supporting the position of the State of Vermont. Amici urge this Court to reverse the Second Circuit's decision in this case, which conflicts with other circuits in allowing states to be sued under the federal False Claims Act ("FCA"). This decision subjects states and other governmental entities to the FCA's draconian remedies of treble damages plus penalties and undermines the system of cooperative federalism upon which this nation was founded.

Amici are local government entities that receive federal funds annually (either directly from the United States or through the states in which they are located) for numerous essential municipal services and programs. Generally, amici are responsible for providing these essential services to their citizens and for implementing those programs, while the federal government and states disburse the funds and monitor their expenditure. Because they receive federal funds, amici are potential targets for suit under the FCA.¹

The False Claims Act was enacted in 1863 at the height of the Civil War primarily to "combat rampant fraud in Civil War defense contracts." S. Rep. No. 99-345, 99th Cong., 2d Sess. 8, *reprinted in* 1986 U.S.C.A.A.N. 5266, 5273. The chief purpose of the Act was to address frauds perpetrated by large private contractors. *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Over the years, Congress amended the FCA many times, making significant amendments in 1986

1. Cook County, Illinois has recently filed a petition for certiorari in *Cook County, Illinois v. Chandler*, No. 99-266, in which it seeks review of the question of municipal immunity from suit under the False Claims Act.

by, *inter alia*, increasing the statute's mandatory civil remedies from double to treble damages and from a \$2,000 penalty to a \$5,000-\$10,000 penalty for each violation. 31 U.S.C. § 3729(a). See S. Rep. No. 99-345, 99th Cong., 2d Sess. 8, reprinted in 1986 U.S.C.C.A.N. 5266, 5273. Under the statute, as amended in 1986, a whistleblower, known as the "relator," is generally entitled to receive between 15 and 30 percent of the total recovery. 31 U.S.C. §§ 3730 (d)(1); (d)(2).

Prior to the 1986 amendments, it appears that, with one exception, the statute was not invoked against states or localities. See *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980) (court vacated district court decision that states were not "persons," holding instead that the district court had lacked subject matter jurisdiction over the case). Subsequent to 1986, however, there have been an increasing number of cases brought against governmental entities, thereby subjecting states and localities to the statute's severe remedial structure and allowing private individuals to collect a bounty at state and local taxpayers' expense.

In this case, the State of Vermont argued that it was not a "person" subject to liability under the FCA, because, under the "plain statement rule," states are not normally considered "persons" unless specifically defined as such. *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195, 203 (2d Cir. 1998). As a corollary to that argument, Vermont contended that, since courts do not ordinarily impose punitive remedies against states, and the FCA's remedies are punitive, states were not "persons." The Second Circuit rejected that argument, holding that states were "persons," based in part on a cursory analysis of the statute's remedies in which it concluded that those remedies were not punitive. *Id.* at 207.

The Second Circuit's holding has profound implications for the issue of local government liability. For local governments, to which the "plain statement rule" does not apply, the critical question for determining if they are "persons" under the statute is whether the statute is punitive; if so, liability may be imposed on them only if there is unequivocal congressional intent to do so. Therefore, amici's brief will focus on this issue, and will demonstrate that the Second Circuit's perfunctory analysis was incorrect.

In addition, amici will address the policy implications of holding states and local governments liable under the FCA. Allowing government liability under the FCA will adversely affect states and localities' ability to perform their governmental functions. Local governments administer many federal programs, providing services to their residents such as education, healthcare, child welfare and environmental protection, and it is the localities' ability to provide these critical services that is jeopardized by the treble damages and \$10,000 per claim penalty imposed against both states and localities under the Second Circuit's reading of the FCA.

SUMMARY OF ARGUMENT

Under principles of common law, governmental entities, which include states and localities, are immune from punitive remedies, unless the legislature's intent to impose such remedies on them is unmistakable. This immunity is based on the understanding that: (1) punitive awards against governments punish only taxpayers, not individual malefactors; (2) punitive sanctions against governments do not deter future violations by individual government employees, since the award would not come out of their pockets; and (3) the imposition of such remedies against states and localities would likely result in an increase in taxes and/or reduction in services for taxpayers.

As courts have recognized, punitive remedies are not limited to punitive damages, but rather encompass all extracompensatory remedies designed to punish and deter defendants. In the case of the False Claims Act, particularly as amended in 1986, its remedies of treble damages plus up to \$10,000 per false claim are punitive in purpose and effect. On its face, these remedies do far more than make the government whole. Moreover, Congress specifically intended these remedies both to punish wrongdoers and deter future violations — purposes that make no sense in a case against a governmental entity.

Therefore, under common law, states and other governmental entities are not liable under the FCA unless Congress demonstrated a clear intention to abrogate governments' immunity from punitive sanctions. This Congress did not do. Neither the plain language of the statute nor its legislative history evidences that congressional intent. Rather, the language leaves the term "person" undefined, and states are normally not considered "persons" unless specifically defined as such. Further, the debates both in 1863 and at the time of the 1986 amendments show that Congress was concerned only with fraud by private contractors, not governmental entities, and that its principal goal was to protect taxpayers, a goal undermined by making states and localities potential defendants.

Accordingly, under established common law principles, because the False Claims Act imposes punitive remedies, this Court should hold that governmental entities are not "persons" subject to liability under the Act.

ARGUMENT

I.

STATES AND THEIR POLITICAL SUBDIVISIONS ARE NOT "PERSONS" UNDER THE FALSE CLAIMS ACT, BECAUSE THEY ARE IMMUNE UNDER COMMON LAW FROM THE PUNITIVE REMEDIES THAT THIS STATUTE IMPOSES, AND CONGRESS DID NOT CLEARLY INTEND TO ABROGATE THAT IMMUNITY

A. Governments Generally Are Immune from Punitive Remedies, Because Such Remedies Penalize Innocent Taxpayers and Threaten Disruption of Government Services

Under common law principles, governmental entities are immune from punitive remedies except in instances when Congress clearly intends to abrogate that immunity. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (under § 1983 of the Civil Rights Act of 1851, no punitive damages may be awarded against municipalities because Congress did not intend to subject municipalities to punitive damages). The reason for this common law immunity from punitive damages is simple: punishment should be imposed only against individual wrongdoers. *Id.* at 261. To the extent a punitive award is allowed against a governmental entity, however, it punishes the general public instead. *Genty v. Resolution Trust Corporation*, 937 F.2d 899, 910 (3rd Cir. 1991). Moreover, the goal of deterrence is not served by imposing punitive sanctions against a government, because such sanctions are not likely to restrain future violations by individual actors; the award would not come from their pockets. *Id.* Punitive remedies imposed on a governmental body are in effect a "windfall to a fully compensated plaintiff, and are likely accompanied by an

increase in taxes or a reduction of public services for the citizens footing the bill." *City of Newport*, 453 U.S. at 261.²

While this common law immunity has been applied most frequently to local governments, the reasoning behind it applies equally to states, as courts have recognized.³ See *Tang v. State of Rhode Island*, 904 F. Supp. 55 (D. R.I. 1995) ("... a municipality (and, by analogy, a state) is immune from punitive damages under § 1983 ..."); *Ostroff v. State of Florida*, 554 F. Supp. 347, 353 n.10 (M.D. Fla. 1983) (State of Florida immune from punitive damages under *City of Newport* rationale). See also *Rose v. Port Authority of New York and New Jersey*, 13 F. Supp. 2d 516 (S.D.N.Y. 1998) (bi-state authority immune from punitive damages under

2. The court in *Genty* noted two major distinctions between municipal corporations and ordinary corporations that militated against imposing punitive awards on the former — the opportunity for disassociation and the difference in accountability. *Id.* at 910. Unlike citizens of a municipality, shareholders can promptly disassociate themselves from a corporation upon receiving information of improper conduct by selling their stock or bringing a remedial action. In addition, shareholders receive at a minimum quarterly reports of a corporation's activity, but municipal officials make no similar accounting to the public. *Id.*

3. Under principles of sovereign immunity and the Eleventh Amendment, states ordinarily are not liable for damages when private individuals bring suit against them. See, e.g., *Alden v. Maine*, 119 S. Ct. 2240 (1999). The issue of states' specific immunity from punitive damages therefore has not arisen frequently. In the case of the False Claims Act, the Eleventh Amendment applies only to suits in which the relator sues without the intervention of the United States. See *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 882, *supp. op.*, 173 F.3d 890 (D.C. Cir. 1999). Accordingly, to resolve the statutory construction issue in this case, which is relevant both to suits brought by relators and by the United States, amici urge this Court to analyze the punitive nature of the statute and apply governmental entities' traditional common law immunity from punitive remedies.

City of Newport rationale); *Bolden v. Pennsylvania State Police*, 1986 U.S. Dist. LEXIS 21967 (E.D. Pa. 1986) (state agency immune from punitive damages); *Ferguson v. Joliet Mass Transit District*, 526 F. Supp. 222 (N.D. Ill. 1981) (public utility immune from punitive damages). As with a municipality, assessing punitive damages against a state entity would only punish taxpayers, not wrongdoers, and would not deter future misconduct by state employees.

Further, although traditionally government immunity from remedies that punish has arisen in the context of punitive damages, this Court has applied the same principles to other civil remedies that may be viewed as punishment, including treble damages. As this Court commented in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981), a case brought under the Clayton Act, "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct . . ." In *City of Newport*, this Court relied on *Hunt v. City of Boonville*, 65 Mo. 620 (1877), a case exempting municipalities from treble damages under a state trespass statute, because allowing the imposition of such damages would penalize innocent taxpayers. 453 U.S. at 261. Accord *Genty*, 937 F.2d 899 (municipalities not liable under RICO because of treble damages remedy); *Barnier v. Szentmiklosi*, 810 F.2d 594 (6th Cir. 1987) (treble damages not allowed against a municipality under Michigan false arrest statute). See also *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274-75 (1989) (equating treble and punitive damages in discussion of the Eighth Amendment); *Smith v. Wade*, 461 U.S. 30, 36 (1983) (noting that treble damages in the patent code was a punitive civil remedy).⁴

4. Congress also understands treble damages to be punitive sanctions. For example, in passing the Local Government Antitrust Act of 1984, and exempting municipalities from liability for treble damages for antitrust violations, Congress explained: "The record
(Cont'd)

This Court also considers civil penalties to be punitive under common law principles. See *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992) (civil penalties under the Clean Water Act and the Resource Conservation and Recovery Act of 1976 intended as punishment); *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) ("the remedy of civil penalties is similar to the remedy of punitive damages"). See also *Smith v. Wade*, 461 U.S. at 36 (noting that civil fine in 1863 False Claims Act was a punitive remedy).

B. The Second Circuit Wrongly Concluded that the FCA Is Not Punitive

The False Claims Act is punitive because it entitles the federal government to recover both treble damages and a civil penalty of between \$5000 and \$10,000 for each false claim. 31 U.S.C. § 3729(a). As shown above, courts ordinarily consider statutes with *either* treble damages *or* civil penalties to be punitive.

The legislative history of the False Claims Act confirms that the remedies were largely intended to serve punitive purposes. Enacted in 1863, during the Civil War, the False Claims Act was intended to address widespread and blatant fraud by private military contractors, who had been billing the United States for nonexistent or worthless goods, charging exorbitant prices for goods, and generally

(Cont'd)

does support, however, the notion that municipalities — and their taxpayers who must ultimately shoulder the burden — should not be subject to punitive sanctions in the form of treble damages." H. Rep. No. 98-965, 98th Congress, 2d Session 18 (1984), reprinted in 1984 U.S.C.C.A.N. 4619. See also *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199, 1999 U.S. LEXIS 4376, at *35 n.11 (1999) (noting that Congress exempted United States from treble damages authorized in patent infringement action against all other parties).

plundering the public treasury. See *United States v. McNinch*, 356 U.S. 595, 599 (1958). Its purpose was not merely to compensate the federal government, but rather its "stringent provisions are required for the purpose of punishing and preventing these frauds." *McNinch*, 356 U.S. at 600, quoting Cong. Globe, 37th Cong., 3d Sess. 952 (1863). See also Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L. J. 1795, 1855, 1861 (June 1992) (intent of False Claims Act to punish wrongdoers). To accomplish this purpose, Congress provided for a civil action against contractors with remedies of double damages and a \$2000 penalty for each false claim. Cong. Globe, 37th Cong., 3d Sess. 957 (1863).

The 1986 amendments to the Act increased the punitive nature of the statute's remedies by establishing the current treble damages and \$5,000 to \$10,000 penalty per false claim.⁵ Making this change, "Congress understood very well that it was instituting new 'punitive sanctions.'" Mann, 101 YALE L.J. at 1860.⁶ Congressman Fish, a sponsor of the

5. In addition, section 3730(d)(5) was added in 1986 to provide that prevailing relators may be awarded reasonable attorneys' fees in addition to any other percentage of award recovered. S. Rep. 99-345, 99th Cong., 2d Session 29 (1986), reprinted in 1986 U.S.C.C.A.N. 5294. Previously, the FCA did not contain a specific authorization for fees, and these were added to be "payable by the defendant in addition to the forfeiture and damages amount." *Id.* Since the provision for attorneys' fees represents yet another monetary drain on a government defendant's treasury, in addition to treble damages and fines, it renders the current FCA remedial structure more punitive.

6. In fact, in hearings conducted on the 1986 amendments, the Department of Justice had opposed the change from double to treble damages, and had suggested increasing the penalty from \$2000 to \$5000, rather than \$10,000, cautioning that judges would be less

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1986 amendments in the House, explained that the purpose of the unamended Act's

double damages recovery, with the accompanying civil fine, is intended to be a substantial penalty — to forcefully discourage individuals and companies that do business with the United States from engaging in fraudulent practices . . . the dual purpose of any such law should always be to deter as well as punish fraudulent conduct.

132 Cong. Rec. 22,336-37 (1986). In order to increase the Act's deterrent effect, however, the consensus was that increasing the penalties from \$2000 to \$10,000 was necessary. *See* 132 Cong. Rec. 22,335, 22,336 (1986) (statements of Rep. Glickman and Rep. Brooks, respectively). Augmenting the House's increase in civil penalties, the Senate bill allowed for the imposition of treble damages; after reconciliation, the Senate's treble damages clause and the increase in civil penalties found in both bills were adopted. *Id.* at 34; 31 U.S.C. § 3729(a).

In the face of this overwhelming evidence of the statute's punitive purpose and effect, the Second Circuit rejected the state's argument that the treble damages and penalties of the FCA were punitive and that the statute therefore did not authorize suits against states. *Stevens*, 162 F.3d at 207. In a

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likely to hold in favor of the government if the penalties to be assessed appeared punitive rather than remedial. Michael Lawrence Colis, *Settling for Less: The Department of Justice's Command Performance under the 1986 False Claims Amendments Act*, 7 Admin. L. J. Am. U. 409 (Summer 1993), citing False Claims Reform Act: Hearings on S. 1562 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 2 (1985) (statement of Jay B. Stephens, Deputy Associate Attorney General, U.S. Department of Justice).

cursory discussion, the Second Circuit explained that the double damages in the 1863 FCA were remedial, enacted in order to compensate the government fully for its losses. *Id.* However, the Second Circuit failed to examine either the initial intent of Congress when it enacted the statute in 1863 or the critical issue of whether the change to treble damages and escalation of penalties made the statute punitive.⁷

In contrast, the D.C. Circuit in *United States ex rel. Long v. SCS Business and Technical Institute, Inc.*, 173 F.3d 870, *supp. op.* 173 F.3d 890 (D.C. Cir. 1999) examined both issues, and indicated that it considered the statute punitive. Looking back to the intent of Congress when it enacted the statute in 1863, the D.C. Circuit commented: "The 1863 Congress . . . made clear as day that it intended criminal, and a fortiori punitive, sanctions. . . . Those provisions are surely inconsistent with the concept of state liability." *Id.* at 878. Further, the court pointed out that the statute could be characterized as remedial only prior to the 1986 amendments, when the statute provided for double damages of which the government only received a one-half share. *Id.* at 877, citing *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 349 n.3 (S.D.N.Y. 1998) (holding that states and municipalities were not persons under the FCA and the statute was punitive).⁸ Thus, the court reasoned, once the

7. The Second Circuit also failed to consider its own earlier decision in *Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc.*, 635 F.2d 118, 126 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982), in which it expressly recognized, even before the 1986 amendments, that the remedial scheme of the False Claims Act was particularly punitive, since it called for *both* multiple damages and civil penalties, rather than one or another.

8. The D.C. Circuit in *Long* relied heavily on the district court's analysis in *Graber* in determining that Congress did not intend states to be liable under the FCA, although it noted that "[o]f course, *Stevens*, not *Graber*, is Second Circuit law." *Long*, 173 F.3d at 875 n.7.

statute was amended to increase the penalties to treble damages and decrease the relator's share, it was no longer merely making "the government whole." *Id.*⁹

In sum, this Court should adopt the reasoning of the D.C. Circuit, reject the perfunctory analysis of the Second Circuit, and find that the statute imposes punitive remedies that ordinarily may not be assessed against governmental entities.

9. The United States may argue that governmental immunity from punitive damages does not apply to suits brought by the United States, an argument that was properly rejected in *Graber*, 8 F. Supp. 2d at 350-351. As the court in *Graber* explained, the doctrine of governmental immunity from punitive damages has its roots in policy considerations, not in the law of sovereign immunity. *Id.* Those policy considerations apply with full force to suits brought by the federal government: "If *City of Newport* means anything at all, it means that it is up to Congress to clearly signal its desire to subject municipalities to exemplary damages, regardless of the plaintiff." *Id.*

Further, the United States may claim that the FCA's remedies are compensatory rather than punitive, relying on double jeopardy jurisprudence holding that an FCA civil suit does not bar a subsequent criminal prosecution. *See, e.g., United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996), *cert. denied*, 520 U.S. 1132 (1997). In relying on double jeopardy law, however, the United States would be ignoring the critical distinction between "punitive" civil sanctions for the purpose of the Double Jeopardy Clause and punitive sanctions for the purpose of governmental immunity from suit. *See Graber*, 8 F. Supp. 2d at 350, citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943) (despite the fact that multiple civil damages provided for in the False Claims Act are akin to punitive or exemplary damages, for purposes of the application of the Double Jeopardy Clause, they do not constitute a criminal penalty or cause the remedy to lose the quality of a civil action).

C. Congress Did Not Clearly Intend to Abrogate States' and Localities' Common Law Immunity from Punitive Damages

Once it is established that the False Claims Act is punitive, the only remaining issue is whether Congress intended to abrogate governmental entities' common law immunity from punitive remedies. *City of Newport*, 453 U.S. at 261. In light of the strong public policy reasons against penalizing governments, courts require that congressional intent to abrogate that immunity be clearly and specifically expressed. *Id.* To make this determination, courts examine whether a statute "expressly authorizes" government liability for punitive remedies. *Id.* As shown below, there is no express authorization of state liability in the language of the FCA, and, in fact, the statutory language of the FCA and a companion statute, the Program Fraud Civil Remedies Act, as well as the weight of the legislative history, indicate that Congress did not intend to subject states and their political subdivisions to liability.

The statutory language is paramount in determining congressional intent. *See United States v. Oregon*, 366 U.S. 643, 648 (1961) (where language of a statute is clear, there is no occasion to look at legislative history). In the 1863 Act, there was no mention of the possibility of subjecting states to liability. The Act subjected any "person" (not in the military or naval forces of the United States) to liability for double damages and civil penalties. *See Cong. Globe*, 37th Cong., 3d Sess. 953 (1863). When the term "person" is undefined (as in the 1863 Act), it is generally understood not to include states. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). *Cf. City of Newport*, 453 U.S. at 258 (in 1863, the term "person" did not include municipalities when punitive remedies involved).

Consistent with the 1863 Act, the plain language of the 1986 amendments supports the notion that states and other governmental entities continued to be excluded from the liability provisions of the Act. Congress specifically included states only in the new "Civil investigative demands" ("CID") provision of the Act. 31 U.S.C. § 3733(l)(4). Under the CID provision, "[w]henver the Attorney General has reason to believe that any person may be in possession, custody or control of any documentary material or information relevant to a false claims law investigation," the Attorney General may serve pre-complaint discovery "upon such person." 31 U.S.C. § 3733(a)(1). The CID provision goes on to define "person," stating, "[f]or purposes of this section, the term 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision." 31 U.S.C. § 3733(l)(4) (emphasis added).

It is clear that "this section" refers only to the CID provision, because that provision differentiates "this section" from "sections 3729 through 3731 of this title," which are, respectively, the liability provision, the *qui tam* provision, and the procedural provisions of the Act. 31 U.S.C. § 3733(l)(1)(A). Thus, the definition of person in the CID section, which includes states and political subdivisions, is specifically not cross-referenced in the section of the Act that subjects "persons" to liability, despite the fact that the word "person" in the liability section is not defined. 31 U.S.C. § 3729.

By including states and localities in its definition of person only in the pre-complaint discovery provision of the Act, Congress indicated that it did not intend to abrogate their common law immunity from liability under this Act. Had Congress wished to include governmental entities in the definition of person for purposes of liability, it could

easily have done just that. The fact that it included states in one section and not in the other is strong evidence that Congress did not intend to subject them to liability for treble damages and penalties under this Act.¹⁰ See Singer, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (5th ed. 1992) (a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole). See also Long, 173 F.3d at 877 (agreeing with state that limitation "for purposes of this section" defeats relator's argument that CID section evidences congressional intent to subject states to liability).

The policy reasons for including states and political subdivisions in the CID section are readily apparent. Although not wishing to subject them to suit under the False Claims Act, Congress evidently recognized that they may have important information that may shed light on the nature of false claims by private parties. In certain cases, the false claim for payment may actually be made to a State or locality. See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379 (1943) (contracts to work on federally-funded Public Works Administration project entered into with local government); *United States ex rel. Davis v. Long's Drugs*, 411 F. Supp. 1144 (S.D. Cal. 1976) (claims for Medicaid payments submitted to state). In such a circumstance, Congress wished to ensure access to important evidence against private parties that may reside only in the offices of a governmental entity: "It seems rather obvious, however, that states could provide useful evidence to establish

10. As the CID provision demonstrates, when Congress desires to refer to states and their political subdivisions, it knows how to do so. On many other occasions, Congress has explicitly defined the phrase "person" to include states and political subdivisions. See, e.g., 15 U.S.C. § 3002(1); 15 U.S.C. § 3301 (26); 33 U.S.C. § 1362(5); 33 U.S.C. § 1901(a)(8); 33 U.S.C. § 2701(27); 42 U.S.C. § 2014(s); 50 U.S.C. § 167(2).

that private contractors, for example, made false claims." *Long*, 173 F.3d at 877.¹¹

Still more evidence that Congress did not intend to subject states and localities to liability under the FCA is provided by the language of a companion statute, the Program Fraud Civil Remedies Act ("PFCRA"). Passed by the same Congress within weeks of the 1986 amendments to the FCA, the PFCRA provides an administrative remedy for false claims in cases in which the Department of Justice declines to bring court actions and the claim involves a maximum of \$150,000. 31 U.S.C. § 3801 *et seq.* The conduct prohibited by this statute is identical to that prohibited in the FCA, with the sole distinction being the monetary amount at issue. 31 U.S.C. § 3802. Further, the statute provides for penalties of \$5000 per false claim and an assessment of double the amount of each false claim as remedies. 31 U.S.C. § 3802(a)(1)(D). On their face, these remedies are less

11. This interpretation is buttressed by the fact that the CID section was modeled on the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which expanded pre-complaint discovery for the Justice Department in antitrust cases. S. Rep. No. 99-345, 99th Cong., 2d Sess. 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5280. Indeed, the Committee "intends that the legislative history and caselaw [sic] interpreting that statute (citation omitted) fully apply to this bill." S. Rep. No. 99-345 at 33, *reprinted in* 1986 U.S.C.C.A.N. 5298. In that antitrust bill, the CID provisions were broadened to allow for discovery against "non-target" third parties, rather than merely targets. H. Rep. No. 94-1343, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2597. At the same time, person was defined in the CID provisions to include "any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law," a definition which would seem to encompass governmental entities. 15 U.S.C. § 1311(f). Similarly, here, non-target governmental entities are subject to being served with pre-complaint discovery, even though they cannot be liable under the False Claims Act.

punitive than the treble damages and up to \$10,000 penalty per false claim mandated by the FCA.

In the PFCRA, Congress expressed a clear intent *not* to subject governmental entities to liability, because it expressly defined the persons who would be subject to administrative liability and omitted states and localities from that definition. 31 U.S.C. § 3801(a)(6) ("person" means "any individual, partnership, corporation, association or private organization."). As Congress did not mean to subject states to liability for false claims under the PFCRA, it makes no sense that the same Congress would have authorized state liability for the identical conduct under the more punitive FCA. *See Long*, 173 F.3d at 877 ("since both acts proscribe essentially the same conduct, [citations omitted], it would have been quite bizarre for Congress to exempt states from administrative liability if it had thought that states already were subject to the more onerous False Claims Act liability of treble damages and penalties."). *Cf. Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560, 1568 (Fed. Cir. 1995), *cert. denied*, 518 U.S. 1018 (1996) ("Where Congress uses the same form of statutory language in different statutes having the same general purposes, courts presume that Congress intended the same interpretation to apply in both instances.").

Consonant with the statutory language, the legislative history of the 1863 Act supports the view that Congress's sole targets were private entities. As noted earlier, the False Claims Act was intended to address fraud perpetrated by private contractors on the military during the Civil War. The discussion of the Act on the floor of Congress talked only about fraudulent activity by "contractors" and "subcontractors;" there was absolutely no mention of the submission of false claims by states nor any other indication

of an intent to encompass states within the Act's sweep. Cong. Globe, 37th Cong., 3d Sess. 952-58 (1863).¹²

Similarly, the discussions of the 1986 amendments on the floor of Congress reveal no intention to subject states or their political subdivisions to liability. There is absolutely no mention of false claims by governmental entities. Congress's focus was entirely on fraudulent conduct of private corporations. As Senator Grassley, the bill's sponsor explained, the False Claims Act is "even more crucial today as the Government spends hundreds of billions of dollars on contracts with *private corporations* in areas such as defense, aerospace and construction." 131 Cong. Rec. 22,322 (1985) (emphasis added).¹³ See also 132 Cong. Rec. 22,335, 22,340 (1986) statement of Rep. Stark) (discussing the 1986 amendments as reforming the incentives for "Government contractors" to defraud); 132 Cong. Rec. 28,580, 28581 (1986) (statement of Sen. Grassley) (discussing bill's targets as "corporations").

Indeed, in discussing the purpose of the amendments, the point was made numerous times that the False Claims

12. In this case, the Second Circuit apparently believed that the 1863 Congress was concerned about fraud perpetrated by state officials on the federal government, basing this belief on the publication of a House Report in 1862 that had noted the problem of state officials' participation in fraudulent activities. *Stevens*, 162 F.3d at 206. As the D.C. Circuit explained, however, the fraud of state officials referred to in that House Report was not committed against the United States government, and, in any event, this piece of legislative history was not linked to the passage of the FCA. *Long*, 173 F.3d at 876.

13. The Senate bill originally introduced as the False Claims Reform Act of 1985, S.1562, later was enacted with a few changes as the False Claims Act Amendments Act of 1986. S. Rep. No. 99-345, 99th Cong., 2d Sess. 13 (1986), reprinted in 1986 U.S.C.C.A.N. 5278.

Act's ultimate beneficiaries are taxpayers. For example, Senator Grassley stated that the bill "arises from a realization that the government needs help — lots of help — to adequately protect taxpayer funds from growing and increasingly sophisticated fraud." 132 Cong. Rec. 28,580 (1986). Similarly, Congressman Fish explained that the bill "deals with the issue of civil and criminal penalties for those who try to take advantage of taxpayers in this country by filing false claims against the Government." 132 Cong. Rec. 22,335 (1986). Since that is so, absent a clear expression of congressional intent, this Court should not conclude that Congress wished recoveries under the Act to come from some of these same taxpayers — those who unfortunately happen to reside in the particular state or local community found liable under the Act. *Cf. Dammon v. Folse*, 846 F. Supp. 36, 38 (E.D. La. 1994) ("[A]warding punitive damages against the taxpayers of a municipal corporation whom RICO was designed to protect would be counterintuitive to the very purpose of the statute").

In the face of this analysis of the statutory language and legislative history, the Second Circuit nevertheless concluded that states were "persons" subject to liability. With respect to the statutory language, it viewed states as persons under other statutory provisions and applied the principle that, ordinarily, the same word means the same thing throughout the statute. *Stevens*, 162 F.3d at 205. Upon close examination, however, the Second Circuit's arguments fail.

First, the Second Circuit relied on the CID provision's inclusion of "states" in its definition of person. *Id.* at 207. However, as discussed above, Congress's authorization of discovery against states indicates just the opposite, since it expressly limits the CID's definition of "person" to that section alone. See pp. 14-15, *supra*. Accord *Long*, 173 F.3d at 877.

Second, the Second Circuit emphasized its belief that the statute authorized states to be relators in two separate provisions of the statute, reasoning that if states may be plaintiffs under those sections they should also be potential defendants. *Stevens*, 162 F.3d at 204-05. See 31 U.S.C. § 3730(b)(1) (section defining who may be a relator); § 3732(b) (section conferring jurisdiction on district courts over state law claims brought for the recovery of funds paid by a state or locality). As the D.C. Circuit noted in *Long*, however, it is doubtful that the consistent meaning principle can be applied to this case, because this doctrine has an important exception “‘[w]here the subject-matter to which the words refer is not the same in the several places where they are used.’” *Id.* at 881 n.15, quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Here, imposing liability is a quite different issue from conferring a right to sue. *Id.* Accord *Graber*, 8 F. Supp. 2d at 351 n.7. In addition, according to the D.C. Circuit, the Second Circuit’s reasoning was flawed because it equated “meanings” enacted by two different Congresses — the 1863 Congress that enacted § 3729(a) subjecting persons to liability and the 1986 Congress that amended the term person in § 3730(b)(1). *Long*, 173 F.3d at 881 n.15. See also *United States v. American College of Physicians*, 475 U.S. 834, 847 (1986).¹⁴

14. Further, the definition of “person” in § 3729 is different from the definition of “person” in § 3730. Section 3730(e) specifically defines which persons may be relators and excludes several categories of persons, but does not exclude states and local governments. It is basic statutory construction that “the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded.” *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908, 913 (E.D. Va. 1989) (citations omitted). In contrast, no specific exclusions are contained in § 3729, the liability provision of the FCA.

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The Second Circuit’s analysis of the statute’s legislative history is similarly defective, because it is contrary to this Court’s established view of the insignificance of post-enactment legislative history. Notwithstanding Congress’s clearly articulated concern for combating fraud among private contractors, the Circuit relied on a section in the Senate Report accompanying the 1986 amendments to the FCA, which, in describing the “history of the FCA,” states that “the term ‘person’ is used in its broad sense to include . . . States and political subdivisions thereof.” S. Rep. No. 99-345, 99th Cong., 2d Sess. 8 (1986), reprinted in 1986 U.S.C.C.A.N. 273. See *Stevens*, 162 F.3d at 207. As this Court has held time and time again, statements in Committee Reports are not authoritative if they purport “to define a statutory term enacted by a prior Congress,” *United States v. American College of Physicians*, 475 U.S. 834, 847 (1986). Accord *Pierce v. Underwood*, 487 U.S. 552 (1988); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

Applying that principle, the D.C. Circuit in *Long* recognized that this portion of the Senate Report was utterly unconnected to any of the substantive amendments made by the 1986 Congress; it was merely a “legislative observation about what § 3729(a), enacted by an earlier Congress, means.” *Long*, 173 F.3d at 878. The court noted that such post-enactment legislative history is of no import “when the

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The D.C. Circuit in *Long* also noted that the consistent meaning rule did not apply because it did not necessarily agree that states could be relators. See discussion in *Long* at 173 F.3d at 879-81. Amici, however, believe that states and local governments can be relators, and that is no way inconsistent with shielding them from liability under the Act. Allowing FCA suits *against* government entities implicates common law immunities; allowing suits *by* such entities does not.

subsequent Congress takes on the role of a court (or more precisely, a committee of one House) and in its reports asserts the meaning of a prior statute." *Id.* at 878-79. Moreover, the court reasoned, because the Report was attempting to describe only the way in which the Supreme Court had interpreted the Act, and it was completely wrong in its analysis, "the Report is of no legal significance," *Id.* at 879. *Accord Graber*, 8 F. Supp. 2d at 353-54.¹⁵

In sum, neither the statute's language nor history evidence Congress's intent to abrogate governmental entities' traditional common law immunity from punitive damages. This Court thus should determine that states are not "persons" subject to liability under the False Claims Act.

15. The statement appears *only* in a general section entitled "History of the False Claims Act and Court Interpretations" that discusses court interpretations of the Act, not in the Committee's explanation of the specific sections of the Act that reference the term "person." On its face, therefore, it does not purport to be an expression of Congress' intent to include states as liable parties. Rather, it reflects the Committee's understanding of case law under the FCA prior to the 1986 amendments, and, as such, it shows the Committee's fundamental misapprehension of that law. In citing three Supreme Court decisions, the Committee failed to recognize that, in the 123 years in which the FCA had been in effect, no court had ever held a governmental entity liable under the Act. As the D.C. Circuit recognized, the cases cited have nothing to do with the issue of whether an FCA case may be brought against a governmental entity, and in fact do not involve the FCA at all. *See Ohio v. Helvering*, 292 U.S. 360 (1934) (state not immune from federal taxation when it engages in business of a private nature, as opposed to when it performs a governmental function); *Georgia v. Evans*, 316 U.S. 159 (1942) (state may bring case as plaintiff under federal antitrust statutes); *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (municipalities may be held liable for compensatory damages under 42 U.S.C. § 1983 if challenged actions taken pursuant to official municipal policy).

II.

ALLOWING STATE AND LOCAL GOVERNMENT LIABILITY UNDER THE FCA THREATENS DISRUPTION OF GOVERNMENT SERVICES AND UNDERMINES PRINCIPLES OF FEDERALISM AND STATE SOVEREIGNTY

States and local governments are unlike private corporations. Treating them the same under the FCA threatens disruption of government services and undermines the cooperative partnership among different levels of government. Rather than pursuing federal monies for profit, state and local governments apply for and utilize federal funds for the benefit of their citizens, sharing with the federal government both legal and financial responsibility for implementing a wide variety of government programs.

Because of the range of services provided by states and cities with federal financial support, however, all of these services are targets under the FCA. In recent years, there has been a dramatic increase in the number of FCA suits against governmental entities, exposing governments and their taxpayers to litigation costs, the risk of draconian remedies and the threatened disruption of government services. Such suits, which are rarely joined by the United States, interfere with statutory procedures for funding and administration designed to ensure both compliance with federal requirements and the provision of government services. Unless this Court reverses the Second Circuit, FCA suits will be able to go forward against states and localities even when the United States has suffered no damages, has declined to intervene, has invoked administrative procedures to correct possible violations, and/or has concluded that there was no fraud involved.

For example, in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d Cir. 1997), a relator alleged

improper reporting to the Department of Housing and Urban Development ("HUD") by the County of Delaware concerning the transfer of a parcel of land. Apart from the FCA action, HUD investigated the land transfer and concluded that the County owed HUD approximately \$2 million. Ultimately, HUD and the County settled their dispute, with the County agreeing to remit a check to HUD, and HUD in turn consenting to return the funds to the County's line-of-credit so that the monies would be available to fund eligible activities. The United States specifically declined to join the FCA suit, concluding that the matters raised in the relator's complaint did not constitute fraud. *Id.* at 739. The Third Circuit refused to dismiss the case despite HUD's settlement with the County (*id.* at 738-39), thereby throwing a wrench into the cooperative relationship between the two levels of government. As a result of the court's decision, the relator stood to recover a bounty for himself and deprive the County's taxpayers of three times the amount of money that the County allegedly had improperly failed to remit to HUD, notwithstanding the settlement with HUD and the United States' conclusion that no fraud had occurred.

Similarly, in an FCA case against the University of Alabama, the State of Alabama defended against charges by a former graduate student that her work was not properly identified in the University's grant applications to the National Institutes of Health and that, as a result, the University had violated the False Claims Act. *United States ex rel. Berge v. The Board of Trustees of the University of Alabama*, 104 F.3d 1453 (4th Cir.), *cert. denied*, 522 U.S. 916 (1997). The district court allowed the case to proceed to trial, despite the fact that the Office of the Inspector General of the Department of Health and Human Services had investigated the allegations and had recommended that no action be taken because " 'many of the assumptions behind the relator's allegations [were] in error or exaggerations of the truth' " *Id.* at 1456. Although the Fourth Circuit reversed the jury verdict awarding the United States \$1.66 million on the FCA allegations, determining that many of the alleged false

statements were, in fact, true, and that they were immaterial in any event, Alabama nonetheless had to expend substantial resources over the course of several years to defend itself in this action.

In sum, invocation of the FCA against governmental entities undermines the cooperative mechanisms established by Congress to foster the efficacious delivery of government services, threatening the disruption of those services through the imposition of draconian remedies mandated by the statute. Ultimately, this issue of federalism goes to the core of our governmental system, and it should be resolved by this Court's reversal of the Second Circuit's decision in this case.

CONCLUSION

For the foregoing reasons, Court should reverse the Second Circuit's decision in this case.

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In The
Supreme Court of the United States
October Term, 1999

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL.
JONATHAN STEVENS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

**AMICUS CURIAE BRIEF OF ALABAMA MEDICAID
AGENCY, ALASKA DEPARTMENT OF HEALTH AND SOCIAL
SERVICES, CONNECTICUT DEPARTMENT OF SOCIAL
SERVICES, IDAHO DEPARTMENT OF HEALTH AND
WELFARE, KANSAS DEPARTMENT OF SOCIAL AND
REHABILITATION SERVICES, LOUISIANA DEPARTMENT OF
HEALTH AND HOSPITALS, MISSOURI DEPARTMENT OF
SOCIAL SERVICES, RHODE ISLAND DEPARTMENT OF
HUMAN SERVICES, AND UTAH DEPARTMENT OF HEALTH
IN SUPPORT OF THE PETITIONER**

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No. 98-1828

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

STATE OF VERMONT AGENCY OF NATURAL
RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL. JONATHAN
STEVENS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF
IN SUPPORT OF PETITIONER

The Alabama Medicaid Agency, Alaska Department of Health and Social Services, Connecticut Department of Social Services, Idaho Department of Health and Welfare, Kansas Department of Social and Rehabilitation Services, Louisiana Department of Health and Hospitals, Missouri Department of Social Services, Rhode Island Department of Human Services, and Utah Department of Health

respectfully submit this brief *amicus curiae* in support of the petitioner in this case.¹

INTEREST OF *AMICI CURIAE*

Amici are social service agencies responsible for assisting needy citizens in their respective States. Much of the funding for the programs administered by *amici* comes from the federal government through one or more of the statutes designed to advance "cooperative federalism" in public assistance. Examples of such programs are Medicaid, Temporary Assistance to Needy Families ("TANF"), Emergency Assistance, Child Support Enforcement, Foster Care and Adoption Assistance, the Child Health Insurance Program ("CHIP"), and Food Stamps. In all of these programs, States that opt to operate within the parameters set out in the governing federal statute are entitled to claim federal reimbursement for some percentage of their programmatic and administrative expenditures. Approximately one-half of the \$270 billion dollars that the federal government paid to state and local governments last year flowed through these cooperatively-financed public assistance programs. Medicaid alone made up 37% of all federal grant awards to state and local governments in fiscal year 1998.

If States can be named as defendants in suits brought under the False Claims Act ("FCA"), their greatest potential liability will likely be in the public assistance programs administered by *amici* and their counterparts in other States,

¹ Letters from petitioner and respondents indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

because those are the programs that make up the greatest volume of claims and receive the greatest proportion of federal funds. Yet all of these programs already have in place, by statute and regulation, elaborate systems governing compliance, audit, disallowance of claims, and repayment of federal funds improperly claimed. Adding the potential for FCA suits seeking treble damages and additional penalties is unnecessary, inconsistent with the existing remedial structure, and antithetical to the spirit of "cooperative federalism" whereby the federal and state governments work together as partners to assist needy citizens.

SUMMARY OF ARGUMENT

The public assistance programs jointly financed by the federal and state governments represent the largest source of federal funds paid to (and claimed by) state governments. The premise of all of these programs is that both the programmatic and financial responsibility of caring for needy citizens is to be shared by the federal and state governments. States that elect to administer their programs in compliance with broad federal statutory and regulatory guidelines may seek varying percentages of "federal financial participation" in program expenditures.

The interplay between the governing federal laws and regulations and implementing state laws and regulations which together comprise the federal-state public assistance programs are notoriously complicated, and there has developed a comprehensive administrative framework to handle disagreements and disputes as to whether a State properly claimed federal funds in an expenditure. Issues that cannot be handled through negotiation (and most of them are) move through a multi-step administrative process in which the position of the federal agency is fully aired and tested before proceeding to federal court. It also is not unusual for some issues of significant importance to the State

or federal government to be resolved politically or through legislation.

Subjecting the state agencies administering these programs to False Claims Act suits significantly alters the cooperative nature of the programs and the basis on which the States agreed to participate in them. The False Claims Act—with its exclusive emphasis on litigation, its punitive standard of liability, and its embrace of private citizens acting as qui tam relators—is manifestly unsuitable to answer questions regarding the proper division of programmatic and financial obligations between the state and federal governments. Those questions are better left resolved by the administrative and political framework that already exists to address them. For this reason, the court below was wrong to hold that the “plain statement rule” was inapplicable to its construction of whether States were “persons” subject to suit under the Act. Application of the False Claims Act to these programs so changes the forum, the nature of the liability, and the availability of political compromise that the “cooperative” nature of the programs is no longer discernible. The decision below should be reversed.

ARGUMENT

I. Allowing False Claims Act Suits Against State Entities Responsible for Administering the Public Assistance Statutes Jointly Funded By the Federal and State Governments is Antithetical to the Cooperative Federalism On Which Those Programs Rest.

A. Medicaid and the Other Federal-State Assistance Programs Represent a Complex Partnership Between Two Sovereigns.

The economic Depression suffered by this country in the 1930s brought many to the realization that effective public assistance programs required the cooperative efforts of all levels of government—federal, state, and local. The public assistance programs which first surfaced as part of the New Deal, including the beginnings of the food stamp program and family support payments (first called Aid to Dependent Children, then Aid to Families with Dependent Children (“AFDC”), and now TANF), were all based on a “scheme of cooperative federalism” whereby federal funding was made available to States that opted to administer their programs within broad federal statutory and regulatory guidelines. See *King v. Smith*, 392 U.S. 309, 316 (1968). Later programs—including, most significantly, Medicaid, which was initiated in 1965, and more recently, the State Child Health Insurance Program which was established in 1997—continued to follow this general model of a federal-state partnership.

Federal contributions to States for varying forms of public assistance now make up at least one-half of all federal payments to state and local governments. For example, in fiscal year 1998, the federal government made grants and other payments to state and local governments totalling \$253 billion dollars. See Federal Aid to States for Fiscal Year

1998 (U.S. Census Bureau). At least half that amount falls into the various public assistance programs of the type administered by *amici*: over \$101 billion for Medicaid; \$18.5 billion for family support payments (AFDC and TANF); \$4 billion for foster care and adoption assistance; and \$3.5 billion for the administrative costs of the food stamp program, in addition to numerous smaller programs that also operate on a cooperative basis. *See id.* (Table I).²

The Medicaid program—which, as the numbers show, is by far the largest of the federal-state public assistance programs and accounts for over 37% of all federal payments to state and local governments—aptly illustrates the federal-state partnership which is the hallmark of these programs. A State's participation in the Medicaid program is entirely voluntary. *See Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 502 (1990). States that elect to participate must submit state "plans" for approval of the Health Care Financing Administration ("HCFA"), within the Department of Health and Human Services. *See id.* The plan describes the State's Medicaid program, including how it intends to comply with the various requirements of the Social Security Act and implementing federal regulations. *See Social Security Act [hereinafter SSA] § 1902(a)*, 42 U.S.C. § 1396a(a); *see also* 42 C.F.R. § 430.10.

Although labeled a single program, Medicaid in fact consists of as many programs as States that partake in the system. States must provide Medicaid to certain population groups but have the option of covering others. Similarly, a State must cover certain basic services but may cover additional services if it chooses. States set their own payment rates for services, with some limitations. As long

² By point of comparison, the Environmental Protection Agency's grants to States for all the programs it administers (including those involved in the instant case) totaled a little under \$3 billion in the same year. *See id.*

as a State abides by federal standards, it is free to structure its program to address the specific needs of its citizens. As a result, the program varies from State to State but shares certain unifying characteristics as required by federal law.³

Financially as well as programmatically, a "general policy of federal-state cooperation . . . underlies the entire program." *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 532 n.22 (1985). "The cornerstone of Medicaid is a financial contribution by both the Federal Government and the participating State." *Harris v. McRae*, 448 U.S. 297, 308 (1980). If a State agrees to establish a Medicaid plan that satisfies federal requirements, the federal government agrees to pay a specified percentage of the State's programmatic and administrative expenditures. This is known as "federal financial participation" or, more colloquially, as federal "matching funds." *See id.*⁴

³ Forty-nine States participate in Medicaid. The exception is Arizona. Since 1982, Arizona has received federal funds for an alternative medical assistance program for low-income persons that is conditioned upon a system-wide waiver of Medicaid's statutory provisions. *See SSA § 1115(a)*, 42 U.S.C. § 1315(a).

⁴ Although AFDC also operated on a matching fund basis, TANF (which replaced it) operates as a block grant. *See SSA title IV-A*, 42 U.S.C. §§ 601 *et seq.* The program still operates with both federal and state funding. *See SSA § 409(a)(7)*. TANF, like AFDC, sets out broad federal requirements but lets States largely free to determine the contours of their individual programs. *See, e.g., Saenz v. Roe*, 119 S. Ct. 1518, 1528-29 (1999) (TANF); *Lukhard v. Reed*, 481 U.S. 368, 371 (1987) (AFDC).

In the Food Stamp program, the federal government establishes uniform standards for food stamp eligibility and pays 100% of the cost of benefits. 7 U.S.C. § 2013(a). The States determine eligibility and distribute benefits, and the federal government reimburses 50% of those administrative costs. 7 U.S.C. § 2025(a).

The Court of Appeals for the Second Circuit once remarked that the governing federal laws and regulations and implementing state laws and regulations which comprise the federal-state public assistance laws such as Medicaid “present as complex a legislative mosaic as could possibly be conceived by man.” *City of New York v. Richardson*, 473 F.2d 923, 926 (2d Cir. 1973). The federal requirements and funding formulae of the programs are notoriously complex, and not always certain. *See Rosado v. Wyman*, 397 U.S. 399, 412 (1970) (describing AFDC as a program in which “Congress . . . has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding”); *Rehabilitation Association of Virginia v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994) (financing provisions of Medicare and Medicaid “are among the most completely impenetrable texts within human experience”); *N.Y. State Department of Social Services v. Bowen*, 835 F.2d 360, 361 (D.C. Cir. 1987) (federal-state programs of the Social Security Act are “mind-numbing in complexity”); *Friedman v. Berger*, 547 F.2d 724, 727, n.7 (2d Cir. 1976) (stating that the Social Security Act, of which AFDC (now TANF) and Medicaid are a part, is “almost unintelligible to the uninitiated”), *cert. denied*, 430 U.S. 984 (1977).

These complex and highly technical programs for the most part are overseen by the Department of Health and Human Services.⁵ The Secretary of HHS, through the agencies who have her delegated authority, is charged with approving state plans and state plan amendments and of making the federal financial contribution to approved state expenditures. HCFA (which oversees Medicaid), and the

⁵ The food stamp program and other federally-funded, state-administered nutritional programs (such as school lunch) are overseen by the Food and Nutrition Service within the Department of Agriculture.

Administration for Children and Families (which oversees TANF and other family programs such as foster-care and adoption assistance) are divided into ten regional offices and a central office. The regional offices serve as the primary contact for the States in their respective regions.⁶

The principal function of the regional offices is to work with the States in their region to ensure that they are in compliance with federal statutory and regulatory requirements. *See, e.g.,* Regional Office Manual—Medicaid, HCFA Pub. 23-6, at § 1101. In general, every effort is made to resolve compliance questions by negotiations at the regional level. *See, e.g., id;* *see also* 42 C.F.R. § 430.35(a)(2). If negotiations are unsuccessful and if the agency determines that the State’s administration of its plan is in “substantial noncompliance” with federal requirements, it may initiate a compliance proceeding pursuant to SSA § 1116(a), 42 U.S.C. § 1316(a). Such a proceeding may result in termination of federal financial participation for entire categories of state assistance or even the entire state program. *See Bowen v. Massachusetts*, 487 U.S. 879, 885 (1988); *see also* 42 C.F.R. § 430.35(d). The result of these proceedings is reviewable in the federal courts. *See* SSA § 1116(d), 42 U.S.C. § 1316(d).

The regional offices are also responsible for approving specific claims for federal financial participation. As this Court noted in *Bowen*, “[a]lthough the federal contribution to a State’s Medicaid program is referred to as a ‘reimbursement,’ the stream of revenue is actually a series of huge quarterly advance payments that are based on the State’s estimate of its anticipated future expenditures.” 487 U.S. at 883-84; *see also* SSA § 1903(d), 42 U.S.C. § 1396b(d). These estimates are periodically adjusted to reflect actual experience, so that overpayments in one period

⁶ The FNS is similarly divided into a central office and regional offices.

are withheld from future advances in another. *See Bowen*, 487 U.S. at 884; *see also* SSA § 1903(d)(5), 42 U.S.C. § 1396b(d)(5).

The reconciliation between quarterly advances and actual expenditures is made by means of a quarterly expenditure report submitted by a State to its regional office that lists the expenditures for which federal funds were drawn. 42 C.F.R. § 430.30(c). Payment of a claim may be "deferred" if the regional office questions its allowability. 42 C.F.R. § 430.40(a). Deferral is accomplished by excluding the claimed amount from the grant award pending further review. 42 C.F.R. § 430.40(b).

If a regional office determines that a claim or a portion of a claim is improper, the Department will "disallow" the claim. 42 C.F.R. § 430.42. A State may then move for reconsideration before the HHS Departmental Appeals Board. 42 C.F.R. § 430.42(b), (c). If the Board's decision requires an adjustment of FFP, either upward or downward, a subsequent grant award will reflect the amount of increase or decrease. In the event of a decrease (*i.e.*, a "repayment" due to disallowance of claims for which funds were previously drawn), the regulations specify various time tables for repayment that ensure that the financial integrity of the State's program will not be threatened. 42 C.F.R. § 430.48.

In addition to the ordinary duties of the Medicaid Regional Offices, the HHS Office of Inspector General ("OIG") periodically audits state operations in order to determine whether the program is being operated in a cost-efficient manner and funds are being properly expended for the purposes for which they were appropriated. 42 C.F.R. § 430.33(a). After the OIG issues an audit report, state agencies are given an opportunity to submit additional facts that would support clearance of the audit exceptions. 42 C.F.R. § 430.33(c)(1). If the exception is not cleared, the Department takes a disallowance, and the state agency may

appeal the disallowance to the Departmental Appeals Board. 42 C.F.R. § 430.33(c)(2).

Although the question was at one point uncertain, this Court has established that States may seek review of a disallowance decision in district court. As this Court explained in *Bowen*, "[n]either a disallowance decision, nor the reversal of a disallowance decision, is properly characterized as an award of 'damages' " which would give the Court of Claims exclusive jurisdiction pursuant to the Tucker Act. *Bowen*, 487 U.S. at 892. According to the *Bowen* decision, a disallowance is not akin to "damages" of the sort that might arise from a fraud or breach of contract action. *Id.* Rather, a disallowance, or the reversal of a disallowance, merely represents "an adjustment . . . in the size of the federal grant to the State" in carrying out the cooperative program. *Id.*

The procedures for compliance, audit, deferrals, disallowances, and repayment in Medicaid follow HHS's general procedures for all matching fund programs. *See* 45 C.F.R. §§ 201.14 and 201.15 (general rules); *see also, e.g.*, 45 C.F.R. § 257.68 (adopting general rules for SSA title IV-A, at-risk child care program); 45 C.F.R. § 304.29 (adopting general rules for SSA title IV-D, child support enforcement); 64 Fed. Reg. 10412 (1999) (proposing similar rules for CHIP program). The Food Stamp program follows a similar protocol. *See* 7 C.F.R. § 276.4 (deferrals and disallowances); *id.* § 277.12 (audits).

B. Application of the False Claims Act Is Antithetical to the Complex and Cooperative Partnership That Exists Between the Federal and State Governments in Administering Public Assistance Programs.

There are two ways in which States administering federally-funded public assistance programs arguably present "claims" to the federal government for payment. The first is

when the state agency submits a periodic report supporting the federal funds it has drawn and affirming compliance with federal guidelines. For example, the Medicaid Quarterly Expenditure Report includes a certification that the amount expended for which federal financial participation is claimed is "correct" and that "the amounts reported are in accordance with the Social Security Act, the implementing Medicaid regulations, and [the] approved Medicaid state plan." HCFA Form 64. These type of generic certifications have been held sufficient to support a False Claims Act suit if they can be shown to be inaccurate. *See, e.g., Wilkins v. State of Ohio*, 885 F. Supp. 1055, 1061 (S.D. Ohio 1995).

The second type of claim that a state agency may submit is as a provider of services. For example, a Medicaid agency may agree to pay a sister state agency that operates hospitals for the mentally ill for services provided to Medicaid-eligible individuals for Medicaid-reimbursable services. Because the Medicaid program is supported in part by federal funds, the claims submitted to the Medicaid agency are considered claims presented to the federal government for payment. *See* 31 U.S.C. § 3729(c); *United States v. Country View Care Center, Inc.*, 797 F.2d 888, 890-91 (10th Cir. 1986).

Allowing False Claims Act suits to proceed against States and state entities making these sorts of claims in public assistance programs such as Medicaid, TANF, and Food Stamps would damage the complicated and delicate federal-state partnership upon which those programs are based.

First, because False Claims Act litigation can be brought and conducted by private citizens acting as qui tam relators, construing the Act to allow suits against States for claims made in connection with the federally-supported public assistance programs interposes a third party into the well-defined and well-regulated relationship between the state agency and its federal counterpart. As the courts have long recognized, the public assistance statutes and the

requirements they set out are exceedingly complex. *See supra*, p. 8. Disputes as to compliance with statutory terms or allowability of claims are inevitable, and there is an extensive administrative process in place to address those questions. Issues that cannot be handled through negotiation (and most of them are) move through a multi-step administrative hearing process in which the position of the federal agency is fully aired and tested before proceeding to federal court. It also is not unusual for some issues of significant importance to the State or federal government to be resolved politically or through legislation.⁷

A False Claims Act suit brought by a qui tam relator has no place within that structure. Judge Weinstein's dissent from the decision below well captures how federal-state dynamics are disrupted by qui tam actions, thereby impairing the successful function of cooperative federalism programs such as the public assistance programs administered by amici. *See United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195, 225-29 (2d Cir. 1998). It undercuts the possibility of a collaborative negotiation between the federal and state agencies. *Id.* at 227-28. And it effectively eliminates the possibility of political intercession or compromise. *See id.* at 225-26.

The impropriety of allowing False Claims Act suits against state social service agencies is especially apparent if, by virtue of the compliance certifications signed as a condition of receiving federal funds, *see supra* p. 12, the Act can become a vehicle for challenging whether a State has in

⁷ One example with which the Court is familiar is the debate between HCFA and New York State as to the allowability of the State's "provider taxes" which help support the Medicaid program. After administrative negotiations stalled, Congress as part of its appropriations package confirmed that the taxes were an allowable source of funds. *See Clinton v. City of New York*, 118 S. Ct. 2091, 2095-96 (1998).

fact complied with those requirements. Because there are many provisions of the Social Security Act and other public assistance statutes that cannot be enforced in a private right of action, *see, e.g., Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992), such a result would mean that a private citizen who may not be able to bring an equitable action to enforce compliance can nonetheless bring suit, as a qui tam relator, seeking damages on the ground that a statement of compliance was the premise of a "false claim" against the federal government. In the latter case, as in the former, the Court should be wary of concluding that Congress intended for the federal courts to decide questions that are more properly resolved under the expertise and judgment of the federal agency with administrative oversight.

Equally significant, application of the False Claims Act improperly turns a disallowance of improperly or incorrectly claimed funds (which is a normal if disagreeable part of doing business in the public assistance programs) into a claim for damages. Penalties under the Act include a fine of up to \$10,000 per claim and "3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a). Yet, as this Court held in *Bowen*, "[n]either a disallowance decision, nor the reversal of a disallowance decision, is properly characterized as . . . 'damages'." 487 U.S. at 892. Rather, a disallowance merely represents "an adjustment . . . in the size of the federal grant to the State." *Id.* Taking what might otherwise be a disallowance and trebling it because it has been the subject of a suit under the False Claims Act completely distorts the division of financial responsibility set out in the public assistance statutes and accepted by the States when they voluntarily agreed to conduct their programs according to federal guidelines in exchange for federal financial participation.

As the *Bowen* decision illustrates, the relationship between the federal and state governments in the cooperative

public assistance programs such as Medicaid is not akin to the prototypical commercial transaction where the federal government has to protect itself from "false claims." Rather, these programs are complex undertakings by two sovereign entities working in partnership for a shared constituency. Although questions about the propriety of claiming federal funds inevitably arises, the context of those disputes is not (as in the commercial context), whether the federal government got what it paid for, but rather the proper division of programmatic and financial obligations between the two levels of government. The False Claims Act—with its exclusive emphasis on litigation, its punitive standard of liability, and its embrace of private citizens acting as qui tam relators—is manifestly unsuitable to answer those questions, which are better left resolved by the administrative and political framework that already exists to address them.

II. The Incongruity Between the False Claims Act and the Public Assistance Programs, Which Constitute the Largest Source of Federal Grants to the States, Underscores That Congress Did Not Intend the "Persons" Subject to Suit Under the Act to Include States.

The court below held that it was not obliged to apply the "plain statement" rule to its interpretation of whether the "persons" subject to suit under the False Claims Act, 31 U.S.C. § 3729(a), included States and state entities. 162 F.3d at 203. Under the plain statement rule, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). The court below held that the "persons" subject to suit could be held to include States, even though States and state entities are not expressly mentioned, because the False Claims Act "does not intrude into any area of traditional state power." *U.S. ex rel. Stevens*, 162 F.3d at 203. According to the Court of Appeals, the "goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud." *Id.*

As shown above, the court's assumption that extension of the False Claims Act to States does not upset the usual balance of federal and state powers is incorrect as applied to the cooperatively financed public assistance programs such as Medicaid and TANF. Those are voluntary programs that States have agreed to administer within the broad parameters set out by federal statutes and regulations in exchange for federal financial participation in the costs of running those programs. By submitting their state plans for federal approval, participating States have agreed that disputes as to compliance and the allowability of costs claimed are subject to the administrative process, and that funds claimed are subject to audit, deferral, and disallowance.

Subjecting the state agencies administering these programs to False Claims Act suits significantly alters the cooperative nature of the programs and the basis on which the States agreed to participate. States are no longer treated as sovereign partners working together to address the problems of their needy citizens, but as federal "contractors" who must be kept in line by the threat of treble damages. Complex questions as to the division of programmatic or financial responsibility between the federal and state governments are no longer presumed to be resolved by the administrative agencies who daily work together to implement the programs, but are subject to second-guessing and re-prioritizing by qui tam relators and the courts who must hear their suits.

The question is not whether a State already has an obligation not to claim federal funds not authorized by the governing federal statute, as the Court of Appeals mistakenly believed. The audit, deferral, and disallowance processes of the public assistance programs illustrate that that obligation has always been present. Rather, the question is in deciding whether a claim is "fraudulent," the False Claims Act so changes the forum, the nature of the liability, and the availability of political compromise that the "cooperative"

nature of the program is no longer discernible. Viewed in that light, application of the False Claims Act materially alters the landscape in which those programs operate and which the States accepted at the time that they decided to implement their programs, and it was error for the court below not to apply the plain statement rule in determining whether States are "persons" subject to suit under the Act.⁸

⁸ On the other hand, the traditional authority of state governments is not implicated when States serve as relators, bringing suit in the name of the federal government against private parties. Contrary to the assumption of the court below, there is no anomaly in construing the False Claims Act so that States can be "persons" for purposes of bringing suit, but may not be "persons" subject to suit, because the plain statement rule applies only to the latter situation. See, e.g., *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870 (D.C. Cir. 1999), *opinion supplemented by* 173 F.3d 890 (D.C. Cir. 1999). Even without application of the plain statement rule, Congress can choose to give a single word different meanings in different sections of the same statute. See *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

CONCLUSION

For all of the foregoing reasons, *amici* respectfully urge that the judgment of the Court of Appeals for the Second Circuit be reversed.

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In the
Supreme Court of the United States

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.*
JONATHAN STEVENS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF AND APPENDIX OF THE REGENTS OF THE
UNIVERSITY OF MINNESOTA, THE NATIONAL ASSOCIATION
OF STATE UNIVERSITIES AND LAND GRANT COLLEGES, THE
AMERICAN COUNCIL ON EDUCATION, AND THE REGENTS OF
THE UNIVERSITY OF SOUTH DAKOTA AS AMICUS CURIAE IN
SUPPORT OF PETITIONER**

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INTERESTS OF AMICI

Amici curiae (University *amici*) are the Regents of the University of Minnesota,¹ the Regents of the University of South Dakota, the National Association of State Universities and Land Grant Colleges (all of whose members are State universities or land grant colleges), and the American Council on Education (comprised of some 1,800 colleges, universities and educational organizations throughout the United States, including State universities). State universities are arms of their respective States and perform vital State functions of higher education: advanced teaching, research, and public service. State universities are engines of economic prosperity and sources of cultural enrichment for their States and for the nation. The research performed at the nation's universities is vital to the national defense and to the health of our people.

Amici share a broad and fundamental interest in preserving a harmonious relationship with the federal government, and in preventing individuals whose interests are inconsistent with those of both the State and the federal government from improperly interfering in that relationship. *Amici* also share an interest that the public resources of which they are stewards not be subject to claims that are wholly disproportionate to any loss to the government.

¹ This brief *amicus curiae* has been authored solely by counsel representing the Regents of the University of Minnesota; no part has been authored by any party. No person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of the brief.

STATEMENT

For the nation's State universities, this case presents an issue of great importance. The state-federal relationship involving universities exemplifies the healthy cooperative federalism which is described by the panel dissent below. *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 214-29 (2nd Cir. 1998) (Weinstein, J., dissenting). The States' funding of higher education and the national government's support of it are prime examples of inter-governmental programs that work.

In recent years, State universities have been named as defendants in increasingly large numbers of *qui tam* False Claims Act (FCA) cases. Such cases typically involve programs in which federal funds support a core State university function, such as performing advanced scientific research or providing medical training. These *qui tam* suits have harmed the nation's State universities and harmed the federal-state relationship. The nature of these harms was generally described in 1989 in an opinion of the Department of Justice Office of Legal Counsel. 13 U.S. Op. Off. Legal Counsel 207, "Constitutionality of the Qui Tam Provisions of the False Claims Act," (July 18, 1989) (available on Westlaw, 1989 WL 595854 (O.L.C.)) (hereafter "OLC Opinion"). While the OLC Opinion cited only litigation against private defendants, the same harms have occurred in cases against State universities. A few examples of cases involving State universities serve to illustrate these harms.

Qui tam plaintiffs are principally interested in money, not healthy federal-state relations. The FCA's provisions for treble damages and multiple \$10,000 penalties arm the private plaintiffs with potentially crippling leverage. A typical example of an FCA suit

based on medicare payments is *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 282 n.2 (5th Cir. 1999), *pet. for cert. pending*. There, plaintiff had asserted a liability of over \$4 billion based on alleged overpayments of \$20 million, a 200:1 ratio.

Private plaintiffs in these *qui tam* suits also have intense, but idiosyncratic, personal animosities against the defendant State institutions that do not reflect the views of the United States or any concern for maintaining healthy federal-state relations. Thus, in *United States ex rel. Berge v. University of Alabama at Birmingham*, 104 F.3d 1453 (4th Cir. 1996), *cert. denied*, 522 U.S. 916 (1997), plaintiff continued her vigorous prosecution against the defendant university despite the fact that the United States had investigated her charges and found no wrongdoing.

When the issue is whether the United States should sue one of the States which make up the United States, only federal officials whose sole interest is the public interest should be allowed to decide the question. Moreover, unless Congress expressly so states, even those officials should not be able to seek damages against the States which are vastly out of proportion to any injury to the United States.

SUMMARY OF THE ARGUMENT

1. Two sources of information—litigation decided by this Court in 1795, and contemporaneously adopted *qui tam* legislation—show that the Eleventh Amendment to the United States Constitution was understood and intended to bar *qui tam* actions against States.

a. Two hundred four (204) years ago this Court decided *In re Peters (the Cassius)*, 3 U.S. (3 Dallas) 121 (1795). *Peters* was a libel proceeding commenced by an

individual against the sovereign property of France. Indirectly, *Peters* involved two central features of this case: the Eleventh Amendment and a *qui tam* action. The Eleventh Amendment, which was thought to be pending ratification before the States,² was cited to the Court as exemplifying one aspect of the law of nations: an existing jurisdiction "ought not" be exercised against a sovereign in any suit by or at the instance of an individual. 3 U.S. at 127. The Court adopted this principle in the recitals in its writ of prohibition in *Peters*. 3 U.S. at 129–30. *Peters* supports the subsequent, unbroken line of decisions of this Court that the Eleventh Amendment embodies a broad principle of sovereign immunity.

The plaintiff in *Peters* had alleged that the French ship, the *Cassius*, had been fitted out for war within the United States in violation of the Act of June 5, 1794. 1 Stat. 381. That Act authorized *qui tam* actions. Immediately upon issuance of this Court's prohibition in *Peters*, the matter of the *Cassius* was re-filed as a *qui tam* prosecution in Circuit Court. 3 U.S. at 132 n.*; *Ketland qui tam v. the Cassius*, 2 U.S. (2 Dallas) 365 (C.C. Pa. 1796). Consistent with *Peters*, President Washington directed that the District Attorney request that the *Ketland qui tam* litigation be dismissed on grounds of France's sovereignty, *id.*; France considered the *Ketland* prosecution an affront to her sovereignty. *Judge Peters*, 3 U.S. 132 n*. The course of the litigation over the *Cassius* thus shows that both sovereigns considered *qui tam* actions to be barred by the principle of sovereign immunity, which had been incorporated into the Eleventh Amendment.

² Although it was not known at the time, the Eleventh Amendment had been ratified by the requisite number of States well before August 1795, when *Judge Peters* was decided. Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 67 (1972).

Events involving the *Cassius* also illustrate the harm *qui tam* actions can inflict on inter-sovereign relationships. In a strongly worded diplomatic protest which "reviewed the whole quarrel between France and the United States over neutrality,"³ and which was published in Philadelphia in November and December, 1796, France broke off diplomatic relations with the United States. Both the *qui tam* prosecution of the *Cassius*, and the existence of the Act of June 5, 1794, were featured prominently in France's protest. App. 2a-8a.⁴

b. At the time of the adoption of the Eleventh Amendment, "prosecute" and "prosecutor" were terms of art associated with *qui tam* actions; and *qui tam* prosecutions were a common, well-known form of civil action. The framers of the Eleventh Amendment used terminology which at the time would clearly have been understood to bar a *qui tam* prosecution.

Indeed, Congress approved the Eleventh Amendment and enacted identical *qui tam* language almost simultaneously. Within three weeks of approving the Eleventh Amendment, Congress enacted the *qui tam* statute for prevention of the slave trade (the model for the False Claims Act). 1 Stat. 347 (March 22, 1794). The statute used terminology that was functionally identical to the terms of the Eleventh Amendment: "sue for" / "any suit"; "prosecute" / "prosecuted." *Id.*, §§ 2, 4.

³ Alexander DeConde, *Entangling Alliance: Politics and Diplomacy Under George Washington* 439 (1958). France's publication of the diplomatic note was a calculated effort to influence the U.S. presidential election of 1796, an act which infuriated the Federalists and which failed. *Id.*, 441, 474-80.

⁴ The appendix reproduces the portions of the diplomatic note pertaining to the *Cassius* and the Act of June 5, 1794. *The Pennsylvania Gazette*, November 23, 30, December 7, 1794.

Further, in *Adams qui tam v. Woods*, 6 U.S. 336, 340-41 (1805) (Marshall, C.J.), this Court interpreted the word "prosecuted," used in conjunction with the word "any," very broadly. The language of the Eleventh Amendment, like that of the statute in *Adams qui tam*, applies to "any prosecution whatsoever." *Id.*

2. The panel erred in holding that the False Claims Act of 1863 imposed liability on States. *Stevens*, 162 F.3d at 207-08. Neither the Civil War Congress nor President Lincoln intended that States be defendants under the 1863 False Claims Act.

In his First Inaugural Address, and in his July 4, 1861, address to Congress in special session,⁵ President Lincoln articulated the constitutional principles on which he believed the Civil War must be fought. These principles, grounded in *The Federalist*, No. 16, (Alexander Hamilton) (Clinton Rossiter ed., 1961), held that the Union was indissoluble, that States could not withdraw from the Union, and that attempts at secession were usurpations of power and insurrections - unconstitutional acts that were legally void. Individual insurrectionaries in their persons had violated the law, but the States as such remained inviolate. See *Texas v. White*, 7 Wall. 700, 724-27 (1869); *Poindexter v. Greenhow*, 5 S.Ct. 903, 913-15 (1885).

This understanding of the federal system is incompatible with imposition of legal liability against a State itself for abuses of power of individuals holding State offices. Indeed, six years after the Civil War ended, in enacting 42 U.S.C. § 1983, Congress adhered to these principles by extending liability as defendant "persons" to individual State actors, but not to the

⁵ Reprinted in *Abraham Lincoln: Selected Speeches, Messages and Letters*, 138-164 (R. Harry Williams ed., 1961) (hereafter, "Selected Speeches").

States themselves. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

The 1863 legislative history cited by the panel majority (162 F.3d at 205–06) referred only to isolated malfeasance by a state official, not to misconduct by a State itself. This scant history furnishes no basis for concluding that a Civil War Congress acted in derogation of widely accepted principles of federalism which were a conceptual foundation of the Union's war effort.

3. The 1986 amendments to the False Claims Act did not create a liability against States. Not a single statement of a Member of Congress or a representative of the Administration of President Ronald Reagan, supports such liability. *Amici* concur in the arguments of Vermont and other *amici* on these points, and on related questions of statutory interpretation, including the applicability of the "plain statement" rule to the question of statutory interpretation presented in this case.

Additionally, the 1979–80 legislative history of proposed FCA amendments does not support the astonishing proposal—made by the Department of Justice (DOJ) at that time—to define defendant "persons" engaged in bribery to include States. From 1982–1986 the DOJ did not repeat such proposals. The broader legislative environment of that period confirms Congress' hostility to such an idea, for Congress passed at least four laws that excluded States or local governments from liability either for penalties or for multiple damages.

In sum, *qui tam* actions against the States are barred by the contemporaneous understanding of the language of the Eleventh Amendment in 1794–95.

Moreover, neither in 1863, nor in 1986, did Congress seek to impose FCA liability on the States.

ARGUMENT

I. The Eleventh Amendment to the United States Constitution was Understood and Intended to Bar *Qui Tam* Actions Against States.

The historical record demonstrates that the Eleventh Amendment was understood and intended at the time of its adoption to bar *qui tam* actions against States. This record consists of (a) the course of litigation decided by this Court in 1795, and (b) the language of the *qui tam* statute enacted within three weeks of Congress' approval of the Eleventh Amendment.

A. The Course of the Litigation in *In re Peters (the Cassius)*, 3 U.S. (3 Dallas) 121 (1795), Shows that *Qui Tam* Actions Against a Sovereign were Understood to be Barred by the Principle of Sovereign Immunity Embodied in the Eleventh Amendment.

This appeal presents the first opportunity in two hundred four (204) years for the Court to consider the relationship between the Eleventh Amendment to the United States Constitution and *qui tam* statutes such as the False Claims Act. In *In re Peters (the Cassius)*, 3 U.S. (3 Dallas) 121 (1795), the relationship was indirect, for *Peters* itself was not a *qui tam* action. However, Alexander Dallas, representing the *Cassius'* commanding officer, pointed out in argument (3 U.S. at 128) that the case included an allegation that the *Cassius* had been fitted out in violation of the Act of June 5, 1794 (1 Stat. 381)—a statute that did allow a *qui tam* action. Dallas also argued that principles embodied in the law of nations had been accorded at least a

legislative affirmation by the recently proposed Eleventh Amendment. Under these principles an existing jurisdiction "ought not" be exercised against a sovereign in any suit by or at the instance of an individual. *Id.* at 127. This Court's prohibition broadly accepted Dallas' argument. *See id.* at 129-30. Indeed, some twenty years later the Court took particular notice of the correctness of the principles of law laid down in the recitals to the prohibition in the *Cassius*. *L'Invincible*, 14 U.S. (1 Wheat) 238, 259-60 (1816).

The Court's prohibition in *Peters* supports the unbroken line of holdings over the past two centuries that the Eleventh Amendment embodies a broad principle of sovereign immunity. The language of prohibition in *Judge Peters* (3 U.S. 129-30) based on the law of nations, parallels the language of the Eleventh Amendment,⁶ which was then thought to be pending before the States ("ought not" / "shall not be construed to"; "at the suit or instance" / "commenced or prosecuted").

A foreign nation and the several States obviously stand on different footings in their relationships to the United States, and the analogy to *Peters* and *Ketland qui tam* is not complete. However, the States do retain aspects of sovereignty, including immunity from suit by individuals, and this element of State sovereignty was at the forefront when the Eleventh Amendment was under consideration by the States and when *Peters* was decided. As Dallas had pointed out in *Peters*, with

⁶ The Constitution of the United States, Amendment XI, provides as follows:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

respect to that element of sovereignty the Eleventh Amendment and the law of nations are the same.

Subsequent events in the *Cassius* litigation show that *qui tam* actions against a sovereign were understood to be barred by sovereign immunity. Immediately upon issuance of this Court's writ of prohibition, the matter of the *Cassius* was refiled as a *qui tam* action by one Ketland, formerly a subject of the British Crown. *See id.* at 132 n.*; *Ketland qui tam v. the Cassius*, 2 U.S. (2 Dallas) 365 (1796); App. 5a. Consistent with the *Peters* decision, President Washington directed that the District Attorney apply to the Circuit Court for dismissal because the *Cassius* was the sovereign property of France. *Ketland qui tam*, 2 U.S. 365. Like the Supreme Court and President Washington, France considered the prosecution brought by an individual to be a violation of her sovereign rights, and she abandoned⁷ the vessel and transformed the affront into "a matter of state." *Peters*, 132 n.*; App. 7a.

The *qui tam* prosecution contributed to a serious deterioration of United States-French relations in 1796. France objected to allegedly unfounded seizures of her ships, instituted without affidavit, and for which she received no costs upon dismissal. App. 2a-3a. She

⁷ France's diplomatic note indicated she abandoned the vessel before the Circuit Court belatedly decided it had no jurisdiction. (App. 7a) This is consistent with the report of *Ketland qui tam*, which reported only the arguments of the relator and district attorney, and with Dallas' note in the report, which indicated France had declined to submit a claim. *Ketland qui tam*, 2 U.S. at 365-66. Thus, in *Ketland qui tam* France ultimately responded to the invasion of her sovereign immunity from suit in the same manner as Georgia had in *Chisolm v. Georgia*, 2 U.S. (2 Dallas) 419 (1793), i.e., by refusing to appear. *See Jacobs, supra*, 48, 56. Alexander Dallas, who represented the interests of France in *Peters*, previously had represented Georgia in a later stage of *Chisolm*. *See Jacobs, supra*, at 55 n. 53.

objected to the Act of June 5, 1794. App. 8a-9a. France complained that the United States had opened its Courts to suits against sovereigns at the instance of individuals, whose interests were aligned with hostile foreign states, and who pursued circuitous and vexatious means to interfere with French rights. App. 2a-3a, 5a-6a. France withdrew her emissary, App. 9a, and in December 1796 refused to receive a new envoy from the United States. Leonard D. White, The Federalists 242 (1948). These and many other events (including France's effort to interfere in the 1796 election) led to the dispatch of a special mission to France in 1797 (which failed), preparation in this country for an anticipated war, and finally a 1799 special mission to France, which avoided war. See *id.* 241-249. See generally Entangling Alliance *supra*; and William Stinchcombe, The XYZ Affair (1980).

Ketland qui tam is the first known *qui tam* action against a sovereign in our nation's history. The history of the *Cassius* litigation confirms that *qui tam* actions were considered barred by sovereign immunity, and it illustrates why as a matter of policy such actions should be barred. Permitting individuals to interject themselves directly in inter-sovereign affairs is likely to generate conflict between the sovereigns and degrade the relationship. While in the larger scheme the *qui tam* prosecution of the *Cassius* probably exerted but a small force on the tide of events which drove the United States and France apart (see Entangling Alliance; The XYZ Affair), the "Affair of the *Cassius*" was featured quite prominently at the time of the rupture in 1796.

B. The Eleventh Amendment Bars Qui Tam Actions Against States.

1. Qui tam suits were a well-established feature of federal and state laws in the 1790s.

Although an anachronism throughout most of our nation's history, the *qui tam* action was a not insignificant part of the federal law enforcement machinery from 1789 to 1799. *The Federalists* 415-417. Congress had provided a "general jurisdiction" under which private parties could bring these federal statutory causes of action. *Ketland qui tam*, 2 Dallas at 386.

In some federal statutes, such as the prohibition of engaging in the slave trade, the informer could receive an award only if he or she commenced and prosecuted the case *qui tam*. 1 Stat. 347, 349 §§ 2, 4. In others, such as laws governing customs duties or excises on alcohol, only federal officials could prosecute the case, but informers received a portion of the share of the fines paid to the federal collectors. *The Federalists* 416. In others, such as the Act of June 5, 1794, the statute provided that the informer would receive a share of the fine or forfeiture, but the identity of the prosecutor was not specified. 1 Stat. 381, 383 § 3. As illustrated by *Ketland qui tam*, such statutes were believed to authorize *qui tam* prosecutions in the federal District Courts.⁸ *Accord, United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943). Some federal *qui tam* statutes authorized actions against public officials. *The Federalists* 416.

State *qui tam* statutes were also common. *History of Qui Tam*, 91. If federal *qui tam* actions were not barred,

⁸ Some commentators have minimized the scope of *qui tam* jurisdiction or questioned whether *Marcus v. Hess* was correct in believing jurisdiction would lie in a case such as *Ketland qui tam*. See OLC Opinion, at 232; Note, *The History and Development of Qui Tam*, 1972 Wash. U.L.Q. 81, 101 (hereafter, "History of Qui Tam"). The example of *Ketland qui tam* indicates the scope of *qui tam* actions was broader than the OLC Opinion suggests, and that *qui tam* actions were not confined to marginal or insignificant subjects.

state *qui tam* actions would not be. Such actions, if held to be prosecuted against a State by another State rather than by the individual relator, would come within the original and exclusive jurisdiction of this Court. 28 U.S.C. § 1251(a).

The field of state and federal *qui tam* suits which might have been maintained by individuals against States in federal court was potentially wide. Since *qui tam* suits were common and well known, one would expect that the Eleventh Amendment would address this form of action.

2. The word "prosecute" was a term of art commonly associated with *qui tam* actions, and the Eleventh Amendment, by use of that word, was understood and intended to bar *qui tam* actions against States.

Qui tam suits have deep roots in English law. Civil *qui tam* prosecutions derived from actions in which private parties were allowed to bring criminal prosecutions. *History of Qui Tam*, 88. Having grown out of English criminal law, the terms "prosecute" and "prosecutor"⁹ were established terms of art associated with *qui tam* actions.

"Prosecute" was the term used to describe *qui tam* actions in the United States as well. Significantly, the *qui tam* provisions of the False Claims Act were modeled on the statute prohibiting the slave trade, which was approved on March 22, 1794. 1 Stat. 347.

⁹ As the Court noted in *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 291 n. 20 (5th Cir. 1999), Blackstone, who was widely read in the United States, used the term "prosecute" in connection with *qui tam* actions only thirty (30) years before the word was incorporated into the Eleventh Amendment.

The penalties and damages provided by that statute were to be divided as follows:

... one moiety thereof to the use of the United States, and the other moiety thereof to the use of him or her who shall sue for and prosecute the same.

Id., §§ 2 and 4 (emphasis supplied).

The Eleventh Amendment, which had been approved by Congress less than three weeks earlier (March 4, 1794), Jacobs, *supra* at 66–67, governs "any suit" which is "prosecuted" by a citizen. Thus, identical *qui tam* and constitutional language was considered and passed by Congress almost simultaneously. Both, on its face, and when construed in light of a contemporaneously enacted statute, the Eleventh Amendment bars *qui tam* actions against States.

This Court's interpretation of these same terms from a 1790 statute provides a third layer of analysis establishing that *qui tam* actions against States are barred. The terms "any" and "prosecute" were used in the 1790 statute that established a two-year limitations period applicable to *qui tam* actions. 1 Stat. 114 (April 30, 1790). In *Adams qui tam v. Woods*, 6 U.S. 336, 340–41 (1805), speaking through Chief Justice Marshall, the Court gave the phrase "nor shall any person be prosecuted" an expansive interpretation. The statutory language showed "an intention, not merely to limit any particular form of action, but to limit any prosecution whatsoever." *Id.* The Eleventh Amendment parallels this statutory language; it proclaims, in substance, "nor shall 'any suit' be 'prosecuted.'" Like the 1790 statute, the language of the Eleventh Amendment, approved

four years later, conveys the intent to bar "any prosecution [by a citizen] whatsoever." *Qui tam* actions were certainly prosecutions by citizens, and they are governed by the Eleventh Amendment.

Opponents of the Court's Eleventh Amendment jurisprudence have criticized *Hans v. Louisiana*, 134 U.S. 1 (1890), for "extending" State immunity from suit to federal question jurisdiction, arguing there was no general federal question jurisdiction in 1794. However, as the foregoing discussion shows, in the 1790s there was an important federal question jurisdiction covering then-existing statutes that authorized private causes of action, and the Eleventh Amendment in terms bars such actions. *Hans'* critics are in error. At its inception, the Eleventh Amendment was intended to govern federal question cases.

Since the Eleventh Amendment was intended to apply to *qui tam* actions, an FCA prosecution against a State by a relator could be permitted only if the statute in question were so different from historical *qui tam* statutes that in reality the case is prosecuted by the United States, and not by the relator. The False Claims Act of 1863 plainly fails this test, given that the government had no control over *qui tam* prosecutions under that Act. For the reasons explained by Vermont, by her other *amici*, by the dissent below, and by the Fifth Circuit in *Foulds*, *supra*, the current version of the FCA also fails this test.¹⁰ The University *amici* concur in those arguments and commend those opinions to the Court.

II. The Civil War Congress Did Not Intend to Include States within the Category of "Persons" Subject to False Claims Act Liabilities.

¹⁰ See also, OLC Opinion, 228-230.

A. Imposition of False Claims Act Liability Upon the States Would Have Contradicted the Constitutional Foundations Upon Which President Lincoln Waged the Civil War.

The panel majority erred in holding that Congress intended in 1863 to include States within the "persons" subject to False Claims Act liabilities. *Stevens*, 162 F.3d at 207-09. The language employed in 1863 ("bringing said suit and prosecuting same," 12 Stat. 698, § 6), showed on its face that a *qui tam* action against a State would be barred by the Eleventh Amendment ("any suit"; "commenced or prosecuted"). Thus, an intent to include States as defendant "persons" cannot be inferred.

More fundamentally, to have accused States themselves of fraud and malfeasance would have contradicted the very constitutional foundations on which President Lincoln waged the Civil War. Those foundations were articulated in the First Inaugural Address and in the July 4, 1861, address to Congress in special session. *Selected Speeches*, *supra*, at 151-164. Lincoln consistently declared Southern efforts to destroy the Union to be "insurrectionary," and all acts in aid of the rebellion to be unlawful and void. *Id.*, 141-142.

Lincoln set the war effort on constitutional underpinnings established by Alexander Hamilton in Federalist No. 16. *The Federalist*, No. 16, at 116-118 (Rossiter ed., 1961). In No. 16, Hamilton explored the question of what would happen under the new Constitution if States should become "...disaffected to the authority of the Union..." See *id.* at 116. Because national power would act directly on individuals, States could not succeed in opposing or undermining national authority by mere inaction or evasion. See *id.*

at 117. A direct and open defiance would be required. It was to be hoped that the people of the affected State would be sufficiently enlightened to recognize an illegal usurpation of authority, and that the State's judges would perform their duty to declare such acts unconstitutional and legally void. *Id.* In the First Inaugural, and throughout the Civil War, Lincoln adhered to Hamilton's characterizations of such a bold experiment as insurrectionary, unconstitutional and legally void.

Lincoln's conduct of the war followed these principles. He initiated the Union's war effort, not by declaring war on the southern States, but by ordering the individual insurrectionaries to "disperse and retire peaceably to their respective abodes." Proclamation of April 15, 1861. *Reprinted in, Willoughby, The Constitutional Law of the United States*, § 77, at 137 (2nd ed. 1929). The war ended, not with a treaty, but with a declaration of amnesty for most, and the surrender of each individual Confederate general. (Proclamation of Amnesty and Reconstruction, December 8, 1863, *Selected Speeches* 253-256.) Through the course of the war, Lincoln resisted suggestions that any of the stars of the southern States be removed from the flag of the United States. *Texas v. Johnson*, 491 U.S. 397, 423-24 (1989) (Rhenquist, C.J., dissenting). Lincoln's understanding – that the States had entered the Union irrevocably, and that acts in violation of federal law were personal wrongs – were soon thereafter adopted by this Court. *See Texas v. White*, 7 Wall. 700, 724-27 (1869) (principles articulated were not inconsistent with any statement of the executive department during the Civil War); *Poindexter v. Greenhow*, 5 S.Ct. 903, 913-15 (1885) (reiterating principles discussed in *Texas v. White*).

The panel majority's analysis leads to the illogical conclusion that Congress intended to treat northern States as fraudfeors capable of violating even criminal laws, at a time when the concerted military power of the nation was marshaled, not against southern States as such, but against individual insurrectionaries and usurpers of State power. From 1861-1865, it would have been an outrage for any loyal Unionist to accuse the northern States of "fraud" in the conduct of the war effort. Of course, had the FCA applied to States in 1863, southern sympathizers would have been given free reign to attempt to sow discord by making such charges.

In 1871, shortly after the close of the Civil War, Congress enacted 42 U.S.C. § 1983, a comprehensive remedy for a wide range of abuses of State power in derogation of federal law. That remedy was limited to individual State actors; it did not extend to States themselves. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (States not "persons" under 42 U.S.C. § 1983). Thus, in 1871 Congress had hewed to the same constitutional principles on which the Civil War had been fought. The panel majority offered wholly inadequate support for its conclusion that a Civil War Congress itself would have violated such principles. The legislative history from 1862-63 on which the panel majority relied (162 F.3d at 205-06) referred only to isolated malfeasance by state officials, not to misconduct by a State itself.

B. President Lincoln Did Not Oppose the Principle of State Immunity From Suits by Individuals.

The dissent below cited a phrase from President Lincoln's First Annual Address to Congress (also quoted at greater length in Jacobs, The Eleventh Amendment and Sovereign Immunity vii (1972)). The

dissent observed that the doctrine of sovereign immunity has received disapprobation for interfering with "the duty of Government to render prompt justice against itself in favor of its citizens." (162 F.3d at 209-10) While disapprobation was Jacobs' argument, it was not Lincoln's. Since the False Claims Act was "Lincoln's Law," President Lincoln's position should be clarified.

In his First Annual Address, President Lincoln did not mention state immunity from suit. The Collected Works of Abraham Lincoln, Vol. V, 35-53 (Basler ed., 1953). The language cited by Jacobs was taken from President Lincoln's discussion of the new Court of Claims. *Id.* at 44. President Lincoln proposed that, to ease the burden on Congress¹¹ of determining claims against the United States, the Court of Claims should be granted jurisdiction to enter final judgments, appealable to the United States Supreme Court. *Id.*

President Lincoln did not chide the Congress for shirking a duty; he proposed a "more convenient means" to discharge that duty. *Id.* Lincoln acknowledged, however, "the delicacy, not to say the danger" of permitting a court, rather than Congress itself, to authorize a final payment of money against the United States. *Id.* Lincoln's cautious and guarded

¹¹ From the founding of the nation, claims "of all sorts and descriptions" had been presented directly to the Congress. The Federalists 355. Over two centuries later, state legislatures may still entertain claims against the States, and doing so is consistent with due process of law. *Florida Prepaid Post Secondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999). As this Court held in *Hans*, the performance of a State's obligations rests upon honor and good faith, and it is the legislative department which represents the polity and will, and which is to judge for itself the honor and safety of the State. 134 U.S. 20-21. *Hans*'s language, "honor" and "safety," echoes Lincoln's, "delicacy" and "danger."

approach to the national government's waiver of its own immunity belies any suggestion that either he or the Congress believed the national government had authority to run roughshod over the immunity of the States¹² by making them liable as defendant "persons" in suits to be prosecuted by individuals.

III. Congress Did Not Extend False Claims Act Liability to States in the 1986 Amendments to the False Claims Act.

The legislative history of the 1986 amendments to the False Claims Act does not reveal any statement of intention on the part of even one Member of Congress, or on the part of anyone in the Administration of President Ronald Reagan, to extend False Claims Act liability to States. In *amicus curiae* briefs filed in the Courts of Appeals for the Second, Fourth, Fifth and District of Columbia Circuits, the Regents of the University of Minnesota established the above point through detailed explications of the hearings, reports and floor debates leading to the 1986 amendments. It appears that the point is no longer seriously disputed, and a detailed treatment of the issues of legislative history and statutory interpretation by the University *amici* would add nothing of substance to Vermont's

¹² Lincoln had addressed the question of state sovereignty in his July 4, 1861, address to Congress in Special Session. While he rejected use of that term, he affirmed what is obvious: "Unquestionably the States have the powers, and rights, reserved to them in, and by the National Constitution..." Selected Speeches 160. Among these "government powers," *id.*, are the right of the State legislatures to judge how and whether claims asserted by individuals shall be paid, and immunity from suits prosecuted by individuals. Lincoln considered the relative division of authority between State and Nation to rest on the principle of generality and locality. *Id.* Sovereign immunity is a local matter. *Hans*, 134 U.S. at 20-21.

brief and those of other *amici* supporting Vermont. The University *amici* join those arguments. We also commend to the Court the statutory analysis in *United States ex rel. Long v. New York*, 171 F.3d 890 (D.C.Cir. 1999), and *United States ex rel. Graber v. New York*, 8 F.Supp.2d 343 (S.D.N.Y. 1998).

Amici add the following points: (1) even the 1979–80 legislative history does not reveal any legislative support for extending False Claims Act liability to States; and, (2) by 1986 such a proposal would have been wholly inconsistent with the legislative environment.

A. Even the 1979–80 Legislative History of a DOJ Bill that Proposed to Define States as "Persons" that Engage in Bribery Reveals No Support for that Proposal.

The government and *qui tam* plaintiffs have relied heavily on one sentence, found in the history and background section of the 1986 Senate Judiciary Committee report, which asserted erroneously that States had been considered defendant "persons" under the False Claims Act. S.Rep. No. 99-345 at 8 (1986), reprinted in U.S.C.C.A.N. 5266, 5273. That sentence, of course, is part of three pages of background materials that were copied from a 1980 Senate Report¹³ of a DOJ bill that would have amended the False Claims Act in several ways, including addition of a new bribery section to the Act. S.Rep. No. 96-657 at 15 (subd. (i)(1)). In the new section, defendant "person" was defined to include States. *Id.*

Despite the astonishing DOJ proposal to define the States as entities that engage in bribery, in the 1979

¹³ Compare S.Rep. No. 96-657 at 2–4, with S.Rep. No. 99-345 at 8–10.

hearing there was not a word of discussion of the States as possible defendants.¹⁴ Discussion of bribery was limited to private parties. 1979 Hearing, 5, 17. Thus, there is no evidence to be found in the hearing of legislative support for DOJ's 1979–80 proposal to include States as defendant "persons."

Indeed, the inference to be drawn from the 1979 hearing is one of opposition to defining States as "persons." The 1979 Senate Hearing was attended only by the subcommittee chairman, Senator DeConcini. Testimony was taken from current and former DOJ attorneys, who described most of the significant changes being proposed. 1979 Hearing, 2-28. Sen. DeConcini commented favorably on those portions of the bill about which there was testimony. *Id.* However, at the outset, Sen. DeConcini stated on the record that there were unspecified provisions of the bill about which he retained reservations. *Id.* 1. The absence of testimony about defining States as malefactors, the presence of testimony about other important provisions of the bill, and the introductory statement of reservation to some parts of the bill suggest that Sen. DeConcini himself opposed the proposal and let it be known that he did not wish testimony about it. Thus, there is no evidence of any support for the DOJ proposal, and there is an inference of opposition, perhaps from the subcommittee chair himself.

The inference of opposition is strengthened by the 1982–86 legislative history. In 1983, a Department of Justice witness, testifying before another Senate subcommittee, stated the DOJ had been "timid" about

¹⁴ Hearings on Senate Bill 1981 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 96th Congress, 1st Sess., Nov. 19, 1979, 1-28 (hereafter, "1979 Hearing").

seeking new false claims legislation after the rejection of the 1979-80 bill.¹⁵ DOJ's "timidity" suggests that opposition to at least some aspect of its 1979-80 proposal was rather strong. Furthermore, every DOJ-supported version of the administrative counterpart to the False Claims Act—which was proposed and discussed in 1982, 1983 and 1985¹⁶, prior to being adopted in 1986—limited the definition of defendant "person" to "private" entities. On this one particular, following the rejection of its 1979-1980 bill, there was a marked reversal in DOJ's legislative position.

B. By 1986, the Legislative Environment was Hostile to Assessing Penalties or Multiple Damages Against States.

DOJ's 1982-1986 initiatives were in accord with the legislative climate. During this period, Congress on at least four occasions exempted States and/or local governments from liability for fines or multiple damages, and it expressly did not extend new legislation involving fraud or bribery to them. 31 U.S.C. § 3801(a)(6) (1986) (known as "mini-False Claims Act;" "person" includes only "private" organizations); 41 U.S.C. § 52(3) (1986) (anti-Kickback Enforcement Act) ("person" defined; does not include States or local government); 41 U.S.C. § 51-58 (1984) (Local Government Antitrust Act of 1984, excluding local government from anti-trust damages liability)¹⁷; 31

¹⁵ Hearing on Senate Bill 1566 before the Senate Committee on Governmental Affairs, 98th Congress, 1st Sess., Nov. 15, 1983, at 31 (hereafter, "1983 Hearing").

¹⁶ See 1983 Hearing at 107; Hearing on Senate Bill 1780 before the Senate Committee on Governmental Affairs, 97th Congress, 2nd Sess., April 1, 1982 at 72; S.Rep. No. 99-212 at 44, 55.

¹⁷ The civil investigative demand (CID) provisions of the FCA 31 U.S.C. § 3733, were taken from the antitrust laws, Senate Report No. 99-345, at 15. As of 1986, the antitrust laws (1) did not allow any damages action against any level of government, but (2)

U.S.C. § 3701(c)(1982) (Debt Collection Act of 1982, excluding States or local governments from mandatory pre-judgment interest, late payment penalty, or collection fees). For either Congress or the Administration to have proposed extending False Claims Act liability to States in 1986 would have been contrary to the legislative environment.

Assertions that Congress intended in 1986 to expand False Claims Act liability to States are without support. Indeed, the panel majority in this case did not rest its decision wholly on this ground, for it concluded, erroneously, that Congress already had created the liability in 1863. *Stevens*, 162 F.3d at 205-06. The Eighth Circuit's panel decision in *Zissler* similarly sought refuge in the 1863 Act by asserting Congress may have "mistakenly" believed such a liability already existed. *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 874-75 (8th Cir. 1998).

However, Congress cannot create new causes of action through "mistaken" interpretations, as an en banc decision of the Eighth Circuit itself has recognized. *Zajac v. Federal Land Bank*, 909 F.2d 1181 (8th Cir. 1990) (en banc) (allegedly mistaken belief that a cause of action already existed rejected as basis for interpreting legislative intent to create a cause of action; applying implied private right of action standards). Given the rigor of the plain statement rule standard,

allowed States to sue for treble damages even though they could not be sued for damages. The FCA's CID definition of "person" to include State was carefully limited to the CID provisions of the statute. As of 1986 States had exactly the same status under the FCA as they did under the anti-trust laws from which the CID provisions had been borrowed: (1) they could sue for treble damages; (2) they could not be sued; and (3) any information they possessed was available to the government pursuant to a proper civil investigative demand.

Congress certainly cannot legislate against the States by mistake.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals for the Second Circuit.

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THE PENNSYLVANIA GAZETTE
WEDNESDAY, NOVEMBER 23, 1796
[Excerpts; spelling has been modernized]
[Page 1]

Philadelphia, November 23. Authentic.
Translation of a note from the Minister of the French Republic, to the Secretary of State of the United States.

* * *

With regret he finds himself compelled to substitute the tone of reproach for the language of friendship. With regret also his government has ordered him to take that tone; but that very friendship has rendered it indispensable. Its allegations, sacred to men, are as sacred to governments; and if a friend offended by a friend can justly complain, the government of the United States, after the undersigned Minister Plenipotentiary shall have traced the catalogue of grievances of the French Republic, will not be surprised to see the Executive Directory manifesting their too just discontents.

* * *

In contempt of these stipulations, the French privateers have been arrested in the United States as well as their prizes; the tribunals have taken cognizance of the validity or invalidity of those prizes. It were vain to seek to justify these proceedings, under the pretext of the right of vindicating the compromised neutrality of the United States. The facts about to be stated will prove that this pretext has been the source of shocking persecutions against the French privateers, and that the conduct of the federal government has been but a series of violations of the 17th article of the treaty of 1778.

* * *

On the 3d of December, 1793, the President asked of Congress a law confirming the measures contained in the letter from the Secretary of the Treasury, above mentioned. (No. 2.) This law was passed the 5th June, 1794. What was its result? In consequence of this law, the greater part of the French privateers have been arrested, as well as their prizes, not upon formal depositions, not upon established testimony, not upon a necessary body of proofs, but upon the simple information of the consul of one of the powers at war with the French Republic, frequently upon that of sailors of the enemy powers, sometimes according to the orders of the Governors, but often upon the demand of the district attorneys, who assert, upon principles avowed by the government, (No. 3) that their conviction was sufficient to authorize them, without complaint or regular information, to cause the privateers to be prosecuted in virtue of the law above mentioned, (No. 4.).

[EXCERPTS FROM NOTE 4, PUBLISHED ON
DECEMBER 7, 1796]

(No. 4) In virtue of this law the tribunals were only authorized to decide on cases in which the neutrality of the United States shall have been compromised. Yet these tribunals conceived they had a right to pronounce upon prizes made by the French, in almost an indefinite manner.

The proceedings were instituted and pursued without any of the forms for protecting citizens. As the undersigned Minister Plenipotentiary has said, the assertion of an enemy of the Republic was sufficient for causing a prize to be seized, often the privateers which had brought her in, and sometimes for the arrest of her

Capt. no proof was required from the enemy consul who instigated the arrest; he was not obliged to give security for the damages which might result from the procedure, if it were unfounded; the Captain was not allowed to remain in possession of his property, on giving security for its value; the prizes were not valued; they simply placed them in the hands of the officers of justice; rarely were they permitted to be sold; and then the sale was made with slowness, and not till the consent of the two parties was obtained. In fine, when much delay and expense, notwithstanding the shifts of a crafty chicanery, the complainants proved nothing they advanced, the prizes were adjudged to the captors, but refused indemnification for damages and losses occasioned by this seizure.

* * *

Were it necessary to cite here all the vexatious proceedings, commenced against French vessels, the undersigned Minister Plenipotentiary would be obligated to write a volume. He contents himself with adding to what he has just said the affair of the *Vengeance* and that of the *Cassius*.

* * *

[Page 2]

In the month of Thermidor, of the 3d year, (August 1795) the *Le Cassius*, belonging to the Republic, commanded by Capt. Davis, and sent by General Laveaux to the undersigned Minister Plenipotentiary, on a particular mission, requiring her immediate return to St. Domingo, was seized in virtue of an order from the District Court of the United States, for the State of Pennsylvania, and her Captain was arrested at the suit of a Merchant of Philadelphia, to answer for a

pretended illegal capture, made in virtue of his commission, and out of the jurisdiction of the United States.

The undersigned Minister Plenipotentiary complained of this violation of the treaties and of the law of nations, and requested the government to cause, as soon as possible, the release of the Corvette *Le Cassius* and her Captain. He conceived himself so much the more grounded in this request, as he knew that a like interposition was not new in the annals of the United States; as he knew that the Executive power of the state of Pennsylvania had interposed in a similar case, and in the same manner, in favour of the state of Virginia, and as this measure, dictated by a profound knowledge of the law of nations and of the reciprocal duties of nations, had been approved and ratified by the tribunals, organs of the law.^(a) But Mr. Randolph, Secretary of State of the United States, replied to the undersigned on the 15th August, 1795 – "As long as the question is in the hands of our courts, the Executive cannot withdraw it from them."

The undersigned insisting, on the 1st Fructidor, in the 3d year (18th August, 1795) expressed himself in these terms, "I do not know nor ought I to know other than the government of the United States; I cannot under any shape admit the competency of your tribunals, in the different circumstances which arise on the execution or inexecution of the treaties. If these tribunals are the first to violate them, I can only address myself to the government for reparation of that violation; otherwise it would be to render the agents of the French government itself, amenable to these tribunals; which would be to reverse principles." Informed that the *Cassius* and her Captain might be liberated on giving security, the undersigned requested, by the same letter, that the government of

^(a) Simon Nathan versus the commonwealth of Virginia, Dallas's Reports, page 77.

the United States would itself furnish this security; and knowing that the Supreme Court of the United States, which was then in Session, had the power in certain cases of arresting the proceedings of the inferior courts, on their signifying to them a prohibition, he suggested to the Secretary to adopt this sure and prompt method to put an end to this vexatious procedure. Both these requests were refused. The Captain of the *Le Cassius* then addressed himself to the Supreme Tribunal, requested the prohibition, and obtained it. The District Court was enjoined immediately to stop the proceedings which had been commenced, and to liberate Capt. Davis and his vessel.

But the very instant in which the *marshal* was desired to execute the order of the Supreme Court, he had already in possession a new order from another tribunal (the Circuit Court) enjoining him to arrest the vessel anew, upon the charge of an English Merchant and naturalized American, stating that the vessel had been formerly armed in the United States; and consequently requested that she should be confiscated, one moiety to himself, the other moiety to the government. The undersigned being uninformed whether this vessel had ever been armed in the ports of the United States, he was also assured that some individuals had only attempted to put on board arms and ammunition, and which they were prevented from doing at the time; but he takes upon him to affirm, that since this vessel has become the property of the French republic – Gen. Laveaux armed and equipped her wholly at St. Domingo; and that at her arrival here, she had not a cannon or pound of powder which had not been put on board her in the territory of France. This new order was signed by one of the Judges of the Supreme Court (in quality of Circuit Judge) who having already ordered the prohibition in the first instance, must have known very well that this vessel was the property of the French republic; and who must

also have known that the Circuit Court was not competent to this proceeding; which the law and usage have constantly attributed to the district tribunals. But the District court then sat but once a year at Philadelphia; its approaching yet distant session was to be at York-Town, and the prosecutor had adopted this round about mode, to take away every means from the French Republic of obtaining restitution of her vessel, legally, before the expiration of near a year. In the interval, she was to rot at the quays of Philadelphia. This has taken place. The undersigned, from a spirit of conciliation, made an useless attempt with one of the Judges of the Circuit Court to obtain the liberation of the vessel, on giving security; the reply was, that the Judge could do nothing of himself; that the court when assembled could alone determine.

The undersigned Minister Plenipotentiary, made new representations to the Secretary of State of the United States upon the foregoing facts. Mr. Pickering, then Secretary of State, in his answer of 1st August 1795 [sic, should be 1796] – repeats this phrase of Mr. Randolph. "As long as the question is in the hands of our courts, the Executive cannot withdraw it from them," adding thereto this remarkable expression; "and therefore is not chargeable with suffering a violation of the treaties existing between the two Republics." The undersigned complained that the new suit commenced against the *Cassius* had been carried to an incompetent tribunal, and in the same letter, of 1st August, 1795 [sic, 1796], the Secretary of State replied on this head to the undersigned, "the Counsel, who have told you that such is the law, have led you into an error," &c. – maintaining the competency of the tribunal.

The undersigned Minister, in these circumstances, saw himself obliged to disarm the vessel, to discharge the crew, that during these transactions he had supported at great expense, and

abandoned the *Cassius* to the government of the United States – protesting against the illegality of her arrest.

The undersigned Minister is not acquainted with the details of what happened since that time relative to this affair; he only knows that in the month of October last, the Circuit Court declared itself incompetent, notwithstanding the assertion of the Secretary of State, and quashed all the proceedings. In consequence, the Secretary offered him the *Cassius*; as if, after having detained, in contempt of treaties, a state vessel, after having left her to rot in port, the government of the United States were not to answer, both for the violation of the treaties, and for the damages the *Cassius* has sustained. [End of note 4.]

[EXCERPTS FROM THE BODY OF THE DIPLOMATIC
NOTE,
FROM NOVEMBER 23, 1796]

[Page 1 (continued)]

What was the undersigned Minister Plenipotentiary able to obtain in the affair of the *Cassius* and of the *Vengeance*? Nothing.

* * *

In fact, was it not evident, that when the powers at war with the Republic had the privilege, in virtue of the law of the 5th of June, 1794, of causing to be arrested the privateers and their prizes, of detaining them in the ports of the United States, of ruining them by considerable costs, by the excessive expenses which they occasioned them, they drew from that privilege an immense advantage, to the detriment of France. Doubtless it was of little import to them that sometimes the privateers obtained justice, in the last resort, if they

detained the privateer for a length of time, and if they by that means sheltered from their pursuit the commerce of the enemy of France. The neutrality of the United States in this case was altogether to their advantage; and the Federal Government, on seeing this state of things, should, out of respect to its neutrality and to treaties, solicit from the Congress the means of conciliating the duties of the former with the obligations of the latter.

The Government very well knew how to solicit the law of the 5th of June, 1794, when that law was to bear on France alone, when it gave to the tribunals a right which has been abused and which enables them to decide upon prizes; why, on seeing the inconveniences of this law has it not endeavoured to remedy them? Should it wait to be solicited on this head? Should it not anticipate all claims, and when those were presented by the Ministers of the Republic, should it not do justice?

WEDNESDAY, NOVEMBER 30, 1796

[Page 1]

The undersigned Minister Plenipotentiary, in the name, and by the orders of the Executive Directory, protests against the violation of the 17th article above cited, in contempt of which the American tribunals have taken cognizance of the validity of prizes made by French ships of war, of privateers, under pretext of original armament, or augmentation of armament in the United States, or of capture within the jurisdictional line; claims the replevy of all seizures, and the repeal of all other judicial acts exercised on those prizes; and protests, moreover, against all opposition, to the sale of the said prizes.

* * *

The undersigned Minister Plenipotentiary moreover declares, that the Executive Directory regards the treaty of commerce concluded with Great Britain as a violation of the treaty made with France in 1778, and equivalent to a treaty of alliance made with Great Britain, and that justly offended at the conduct which the American Government has held in this case, they have given him orders to suspend from this moment his ministerial functions with the Federal Government.

The same cause which for a long time prevented the Executive Directory from allowing their just resentment to break forth, has also tempered its effects. Neither hatred, nor the desire of vengeance, rapidly succeed to friendship in the heart of a Frenchman; the name of America still excites sweet emotions in it, notwithstanding the wrongs of its government; and the Executive Directory wish not to break with a people whom they love to salute with the appellation of friend.

This undersigned Minister Plenipotentiary therefore announces that the Government of the United States, and the American people, are not to regard the suspension of his functions as a rupture between France and the United States, but as a mark of just discontent, which is to last until the Government of the United States returns to sentiments and to measures more conformable to the interests of the alliance and the sworn friendship between two nations.

* * *

[Page 2]

Let your government return to itself and you will still find in Frenchmen faithful friends and generous allies.

Done at Philadelphia, the 25th Brumaire, 5th year
of the French Republic one and indivisible (15th Nov.
1796, O. S.)

P. A. ADET

SEP 3 1999

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1998

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.*
JONATHAN STEVENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA and WYOMING IN SUPPORT OF PETITIONER

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 IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

 STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,
Petitioner,

v.

UNITED STATES OF AMERICA EX REL.
JONATHAN STEVENS,*Respondent.*

 ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING IN SUPPORT OF PETITIONER

STATEMENT OF AMICI INTEREST

The States of New York, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming urge this Court to reverse the decision and order of the United States Court of Appeals for the Second Circuit which held that the petitioner, Vermont Agency of Natural Resources, was a "person" subject to the liability provisions of the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, and that it could be sued by a private citizen under that statute.

This appeal presents two important issues affecting the liability of States under the FCA. Both issues are of fundamental importance to the States and have been the subject of recent conflicting determinations by the United States Courts of Appeals. The first issue is whether a State is a "person" who may be sued under the FCA. The second is whether a State's Eleventh Amendment immunity prevents a private citizen, known as a *qui tam* relator, from prosecuting the FCA suit against a State to reap a financial reward. Although the lawsuit is brought "in the name of the Government," the relator sues for himself as well as for the United States. 31 U.S.C. § 3730(b)(1).

The decision below undermines the *amici* States' interests and upsets the federalist balance in two important ways. First, its holding that States are subject to suit under the FCA exposes the States and their taxpayers to very significant financial liability. Second, its holding that States can be sued by private citizens undermines the States' sovereignty and weakens the States' ability to administer complex federal programs.

With respect to financial liability, the FCA provides for treble damages and a civil penalty of not less than \$5,000 and not more than \$10,000 for filing false claims. See 31 U.S.C. § 3729(a).¹ In many cases, the penalty provision has been construed to apply to each claim filed.

Under many federal programs, States or entities they regulate file thousands of claims and numerous reports each year with federal agencies. Because a single policy or practice that is found to be wrongful could taint each and every claim filed, and because there is a six-year statute of limitations under the FCA, a single state policy or practice exposes the States to enormous civil penalties together with three times the actual damages incurred by the federal government.

For example, in *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (5th Cir. 1999), the plaintiff alleged that staff physicians at Texas Tech Health Sciences Center routinely signed patient charts and Medicare/Medicaid billing forms certifying that they personally performed or supervised the performance of treatment for patients when in fact the patients were allegedly seen only by residents. The *qui tam* relator alleged that based upon this wrongful practice, the State defendant submitted over 400,000 false claims and received over \$20 million in overpayments. *Foulds*, 171 F.3d at 282 & n.2. Because each false claim could result in a penalty of up to

¹ The original statute provided for recovery of double damages and a penalty of \$2,000, which this Court found to be compensatory based on the government's additional costs in attempting to recover money owed to it. See *United States v. Halper*, 490 U.S. 435, 446 (1989); *United States v. Bornstein*, 423 U.S. 303, 314-15 (1976); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943). The 1986 FCA amendments increased the remedy to treble damages and the penalty to a fine of \$5,000 to \$10,000. False Claims Amendments Act of 1986, Pub. L. 99-562, §2, 100 Stat. 3153 (1986).

\$10,000, the State's liability in that case could amount to hundreds of millions, or even billions, of dollars.

The States' fiscal concerns are not simply a matter of conjecture. Since the FCA was amended in 1986, "[r]ewards in the tens of millions have been reported in a single suit." *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195, 222 (2d Cir. 1998) (Weinstein, J., dissenting), cert. granted, 119 S. Ct. 2391 (1999). Federal grants to State and local governments more than doubled from \$115 billion in 1988 to \$230 billion in 1997. See *Federal Expenditures by State for Fiscal Year 1997* at 46, Table 11 (April 1998), Bureau of the Census, U.S. Department of Commerce, Publication FES/97. A substantial portion of that money comes from social welfare programs, such as Medicaid, which are ready targets for FCA lawsuits because their complex regulatory scheme and vast scope often result in overpayments to States. See, e.g., *Stevens*, 162 F.3d at 222 (discussing shift in emphasis under the FCA from defense-contractor cases to health care-related cases arising under the Medicare and Medicaid programs) (Weinstein, J., dissenting).

With respect to the issue of State sovereignty, the lower court's holding that a private person *qui tam* relator can sue a State despite the bar of the Eleventh Amendment seriously weakens the State's ability to administer complex public assistance and police power programs. States administer these federal programs, such as Medicaid, Aid To Families With Dependent Children (now Temporary Assistance To Needy Families) and the Clean Water Act, under a scheme that has been described as one of "cooperative federalism." *New York v. United States*, 505 U.S. 144, 167 (1992). When a private person is authorized by Congress to sue a State with respect to its administration of one of these complex programs, the State loses a meaningful opportunity to resolve the matter through negotiation or through

the political process, even if such a resolution would be in the public interest.

For example, the underlying dispute in this case concerns whether the Vermont Agency of Natural Resources properly used an accounting mechanism to reflect the time employees spent on federal projects. In the ordinary course, this type of dispute would be resolved administratively between the state agency and the federal agency. However, the relator does not share the federal government's broader interest in maintaining harmonious relations with the States. The relator's sole concern is to reap a huge reward. As Judge Weinstein points out, the relator's allegations "drive[] a wedge between the two agencies, inhibiting a productive, collaborative partnership, generating suspicion and turning what should be a cooperative relationship into a strained and awkward one." *Stevens*, 162 F.3d at 229 (Weinstein, J., dissenting).²

Furthermore, because the private party is seeking only to obtain a large settlement or judgment, he does not concern himself with the disruption that burdensome discovery and trial will have on the States' administration of the program. Counsel for the relator in *Long*, for example, sought and obtained the production of voluminous documents from the New York State Education Department. He also noticed numerous depositions of current or former State employees.

² In *United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870 (D.C. Cir.), op. supplemented, 173 F.3d 890 (D.C. Cir. 1999), the United States elected to intervene only against the private co-defendants. Judge Silberman found that this "suggests that the government does not lightly take on the task of probing into the internal operations of the sovereign states, and may well think it better to leave such politically unpalatable tasks for the *qui tam* relators of the world." *Long*, 173 F.3d at 885.

Both issues presented in the petition therefore involve important matters of federalism that affect the States' relations with the federal government. A reversal of the rulings below is essential to ensure that the States' sovereignty is protected against unnecessary encroachment by the United States and the principle of cooperative federalism is maintained.

SUMMARY OF ARGUMENT

For 136 years, the FCA has imposed liability upon any "person" who engages in specified conduct to defraud the United States but it has not defined the word "person." According to well-established rules of statutory construction, the ordinary meaning of the word "person" does not include a State. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). That construction is to be followed absent "affirmative evidence" that Congress intended to cover States in the FCA.

Furthermore, where a federal statute alters the federal balance of powers, the "plain statement" rule requires that Congress expressly make known within the law itself its decision to include States. This ensures that Congress has in fact confronted, and intended to impose, the new liability upon the States. The FCA results in an alteration in the federal balance of powers because it gives more authority to the federal government, which can now sue a State for treble damages and civil penalties, and it authorizes private citizens to sue States and disrupt the States' administration of complex social welfare and police power programs.

The FCA does not contain a "plain statement" that States are subject to the liability provision. The language used in other sections of the original and amended statute together with the legislative history contain no "affirmative evidence" that Congress intended to include States as defendants in FCA lawsuits. In fact, the statute and its history support the opposite view --

States were not meant to be subject to the liability provision of the FCA. Therefore, because the statute does not expressly apply to a State, the "plain statement" rule requires that States not be included within the scope of 31 U.S.C. § 3729(a).

The decision below should also be reversed on the second ground presented in the petition, that a private person, acting as a *qui tam* relator, cannot sue a State under the FCA because of the bar of the Eleventh Amendment to the U.S. Constitution. Under this Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996), Congress does not have the authority to abrogate a State's immunity from suit by private citizens in federal court under its Article I power. There is no dispute that the FCA was enacted pursuant to Congress' Article I power. Therefore, a private citizen's FCA suit against Vermont should be barred.

The relator cannot avoid the State's Eleventh Amendment immunity defense by claiming that he "stands in the shoes of the government." The language and structure of the *qui tam* provisions of the statute, as well as this Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), demonstrate that the *qui tam* relator sues for himself as well as for the United States and that he has an independent interest in, and significant control over, the litigation.

Even if the relator were considered to be the agent or designee of the federal government, this Court has strongly suggested in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991), that the United States is without authority, absent "compelling evidence," to delegate or assign its right to sue a State to a third party. In *Alden v. Maine*, 527 U.S. ---, ---, 119 S. Ct. 2240, 2264 (1999), this Court stated that there must be "compelling evidence" in the constitutional design that the States had waived their immunity in state court. *See Alden*, 119 S. Ct. at 2255. The respondent and the United States have completely

failed to present any evidence that the State's waiver of immunity "in the plan of the convention" with respect to the federal government extends to anyone whom the United States might select to sue on its behalf. Accordingly, the *qui tam* provisions of the FCA run afoul of the Eleventh Amendment.

ARGUMENT

POINT I

A STATE IS NOT A "PERSON" SUBJECT TO SUIT UNDER THE FALSE CLAIMS ACT.

A State is not a "person" within the meaning of the liability provision of the FCA under two well-established rules of statutory construction. First, statutes which impose liability upon a "person" are not construed to apply to States unless there is affirmative evidence that Congress intended to include them. In the FCA, neither the legislative history nor the statutory context contains affirmative evidence of inclusion. Second, when Congress enacts a statute which shifts the balance of power from States to the federal government, or otherwise interferes with the States' sovereignty, it must make explicit in the law that States are covered. The FCA is such a law and there is no "plain statement" that States are covered by the statute.

A. Under Both The "Ordinary Rule of Statutory Construction" and the "Plain Statement" Rule, The Word "Person" In The Liability Section of the False Claims Act Should Not Include A State.

"[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Will*, 491 U.S. at 64 (quoting *Wilson*

v. Omaha Tribe, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941))). This rule of exclusion applies to the sovereign enacting the statute as well as to States. *Long*, 173 F.3d at 874 n.4, citing *Will*, 491 U.S. at 64. Absent "affirmative evidence" that Congress intended to include States in a law which would expose them to liability, this particular rule of statutory construction compels their exclusion. See *Long*, 173 F.3d at 874. As discussed in Point I(B) *infra*, such "affirmative evidence" is completely absent in the history of the FCA statute.

In addition, when a federal statute alters the federal-state balance of powers, the "plain statement" rule requires that Congress specifically include States within the text of the statute. This Court has set forth the circumstances under which the "plain statement" rule applies. The rule applies when Congress enacts a law which: (1) alters the usual balance of power between the state and federal governments, (2) pre-empts the historic powers of the States, or (3) imposes a new condition on the States' receipt of federal money.

The rule is derived from principles of federalism and a respect for state sovereignty. A "plain statement" compels Congress to address expressly the effect of including States within federal statutes that could alter the ordinary balance of power between the state and federal governments or otherwise interfere with state sovereignty. As Justice Marshall explained in *United States v. Bass*, 404 U.S. 336 (1971):

[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Id. at 349. See also *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991) ("the requirement of a clear statement by Congress to impose such [monetary] liability [on the States] creates a rule that ought to be of assistance to Congress and the courts in drafting and interpreting legislation."); *California State Bd. of Optometry v. Federal Trade Comm'n*, 910 F.2d 976, 981 (D.C. Cir. 1990) ("This rule of statutory construction serves to ensure that the States' sovereignty interests are adequately protected by the political process."). The application of the FCA to States fits squarely within the circumstances in which the "plain statement" rule applies.

First, the rule applies when a federal statute alters the constitutional balance of power. Thus, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will*, 491 U.S. at 65 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

Such an alteration occurs when Congress abrogates the States' Eleventh Amendment immunity because "abrogation of sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States'." *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (quoting *Atascadero*, 473 U.S. at 238). Because a *qui tam* lawsuit under the statute abrogates State sovereign immunity (see Point II *infra*), a "plain statement" that States are covered by the law is required.

The federal balance of power can also be shifted when Congress enacts a law which exposes a State to a new liability since the liability may result in diminished authority for the States. In *Will*, this Court applied the rule to a statute, 42 U.S.C. § 1983, "where it [was] claimed that Congress has subjected the States to liability to which they had not been subject before." *Will*, 491 U.S. at 64.

When Congress subjects States to a new and substantial damages liability, such as the treble damages and civil penalty provisions of the FCA, the usual federal balance of powers has been shifted away from the States to the national government. In these circumstances a "plain statement" of inclusion is "of assistance" to the courts in evaluating Congress' intent. See *Hilton*, 502 U.S. at 206.

The "plain statement" rule is particularly applicable when a federal statute imposes punitive type damages on the States. At common law governmental entities were not subject to punitive damages because it was believed such damages punish blameless taxpayers. It has been considered to be "contrary to sound public policy" to impose punitive damages on a governmental entity absent clear Congressional intent. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263 (1981). By providing for treble damages and increasing the amount of the civil penalty to \$10,000, the 1986 FCA amendments in fact "created a form of punitive damages that would be palpably inconsistent with state liability." *Long*, 173 F.3d at 877; see also *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 349 (S.D.N.Y. 1998).

Second, the "plain statement" rule applies when Congress enacts a law which undermines the historic or essential powers of the States. For example, in *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), the Court determined that Congress must explicitly state its intent to include state court judges under the Age Discrimination in Employment Act because their inclusion interferes with a State's fundamental role in defining the qualifications of its judiciary.

An FCA *qui tam* lawsuit seriously interferes with the States' ability to administer essential state programs. While the statute is concerned with ensuring that the federal government recover money wrongfully obtained, the underlying allegations in FCA

lawsuits against States will frequently involve the States' administration of complex federal programs. As the D.C. Circuit properly concluded in *Long*:

To characterize the relevant state function at issue, as the Second Circuit did, as *fraudulent conduct* ... is to assume the conclusion that the function is not an essential one.... [T]he Act's imposition of liability necessarily interferes with a state's sovereign performance of a range of indisputably essential functions, such as the administration of a state education department involved in the present case.... That the federal government funds in part that function does not destroy its essentiality to the state.

Long, 173 F.3d at 887-888 (emphasis in original) (citations omitted).

Third, the "plain statement" rule applies when Congress imposes a condition upon the States' receipt of federal funds which preempts the State's traditional authority. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 16 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). The reason for this aspect of the rule is that "[b]y insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 17.

The fact that States may be compelled to pay treble damages and civil penalties under the FCA must be viewed as an additional condition for the States' receipt of federal money. When States accept federal funds under other federal programs, they agree to repay the amount of money that they are overpaid, not treble damages and civil penalties. Therefore, Congress must explicitly inform the States in the FCA that they are subject to

this additional condition for their receipt of federal funds under other federal programs.

In sum, the "plain statement" rule must apply to the FCA because it (1) alters the usual constitutional balance of powers, (2) interferes with States' administration of essential programs, and (3) imposes a new condition on the receipt of federal money. Because the FCA does not contain a "plain statement" that a State is a liable "person", States must be excluded from the coverage of the statute.³

B. The Legislative History of the False Claims Act Does Not Contain "Affirmative Evidence" That Congress Intended The Word "Person" To Include States.

There is no "affirmative evidence" in the legislative history of the FCA that Congress intended to *include* States within its scope. The FCA was adopted in 1863 to combat rampant fraud by large private contractors during the Civil War. See *Bornstein*, 423 U.S. at 309; *Marcus*, 317 U.S. at 547. By enacting the FCA, Congress sought to stop this plundering of the Union's treasury. See, e.g., *Cong. Globe*, 37th Cong., 3d Sess., 952-958 (1863).

As originally enacted, the statute prohibited "any person not in the military" from submitting a false claim for payment to the United States. Where liability was found, the statute provided

³ The Second Circuit's decision in *Stevens* and the Eighth Circuit's decision in *United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 154 F.3d 870 (8th Cir. 1998), misapply these rules of statutory construction in several areas principally because they fail to take account of the extent to which the statute interferes with the States' sovereign interests. In *Long*, the D.C. Circuit took great pains to explain the errors in those decisions. For purposes of this brief, we refer to that decision which properly evaluates the States' interests under the FCA.

for both civil penalties (double damages plus a fine of two thousand dollars and costs) and possible criminal imprisonment. *See* Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698. Thus, the legislative context in which the word "person" was used strongly suggests that States were not included because a State plainly could not submit a claim to the United States for payment of military expenses.

Similarly, the 1863 legislative debates centered around individual plunderers, not States. *See, e.g., Cong. Globe*, 37th Cong., 3d Sess. 955 ("The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such") (remarks of Sen. Howard); *id.* at 958 ("if a man swindles the government in times like this there ought never to be any limitation") (remarks of Sen. Grimes).

In an attempt to counter the original statutory language and legislative history, the United States argues that fraud by state officials was a concern of Congress at the time. It relies on a legislative report by a House investigating committee that reported in 1862 upon the grossest frauds on the government concerning war contracts. *See* H.R. Rep. No. 2, 37th Cong., 2d Sess. (1862). There is a brief discussion in the report of wrongful actions taken by state officials. However, in that discussion, "the report specifically stated that these examples of fraud were not committed *against* the United States government." *Long*, 173 F.3d at 876 (quoting H.R. Rep. No. 2, 37th Cong., 2d Sess. at xxxviii) (emphasis in original). In fact, the committee report suggests that the States were often victims of fraud, not perpetrators: "[i]n this emergency, of all others, the State and the nation should demand the highest integrity of those invested with public trusts, and each should hold their agents, by rigid scrutiny, to a severe accountability." H.R. Rep. No. 2, 37th Cong., 2d Sess., at xxxix.

There is also no evidence that the discussion in the report concerning state officials was even considered by the Congress the following year when it enacted the FCA. The sole reference to this report during the following year's debate over the FCA was by Senator Wilson of Massachusetts, who referred to the committees' work in discussing a proposed amendment to the bill that had to do only with *private contractors* and had nothing to do with States. *Cong. Globe*, 37th Cong., 3d Sess., 956. Furthermore, even if Congress had intended to include state officials as "persons," the United States confuses the wrongful actions of individual state officials with the imposition of liability under the FCA against States. In *Will*, this Court specifically rejected the argument that Congress intended to include States within the coverage of 42 U.S.C. § 1983 even though there was debate in Congress of the effect of including state officials within the civil rights statute. *Will*, 491 U.S. at 68-69; *see also Long*, 173 F.3d at 876.

For 123 years, from 1863 until 1986, the statute was "largely unchanged." H.R. Rep. No. 99-660, at 17 (1986). In 1982, the wording of the liability section was slightly revised to "[a] person not a member of an armed force of the United States." There was no intent to make any substantive change. *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877; H.R. Rep. No. 97-651, at 1, 3, 143 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1897, 2037.

In 1986, the FCA was substantially amended. Congress sought to provide stronger measures to combat fraud, and to encourage "private" individuals to sue private enterprise. S. Rep. No. 99-345, at 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5288-89; H. Rep. No. 99-660, at 23 (1986); *United States ex. rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995) (*en banc*), *cert. denied*, 517 U.S. 1233 (1996). Despite major changes to the statute in 1986, the liability provision in 31 U.S.C. § 3729(a) continued to apply to

"[a]ny person." The only change made to the scope of that provision was that persons in the military were now made subject to the FCA. The legislative history indicates that this change was limited to the military and was not intended otherwise to broaden the class of persons who could be held liable under the Act. See S. Rep. No. 99-345, at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5283; *see also Long*, 173 F.3d at 876; *Graher* 8, F. Supp. 2d at 354-55. In fact, the Congressional Budget Office advised that the 1986 amendments were "expected to involve no significant costs to the federal government or to State or local governments." S. Rep. No. 99-345, at 37 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5302.⁴

Thus, Congress in 1863 did not intend to include States within the liability provision of the FCA and, since that time, Congress has maintained virtually the same words to define liability without any intent to broaden the coverage under the statute to include States. There simply is no argument to be made from this history that Congress provided "affirmative evidence" of an intent to include States within the scope of the liability provision of the statute.

A finding that the FCA cannot be applied to the States does not leave the United States without viable remedies. Most federal programs contain provisions requiring States to repay monies improperly received. See, e.g., 7 U.S.C. § 2020(g) (Food Stamps); 42 U.S.C. § 604 (Aid To Families With Dependent Children); 42 U.S.C. § 1396(c) (Medicaid). Although rarely used, the federal government has the authority under many of

⁴ The D.C. Circuit in *Long* properly concluded, based upon a detailed analysis of the 1986 amendments, other textual changes made in the course of the 1986 FCA amendments and the legislative history, that there is no "affirmative evidence" to even suggest that a State was intended to be included as a liable "person" as a result of the 1986 amendments. See *Long*, 173 F.3d at 876-879, for a complete discussion of this history.

these programs to terminate federal financial participation for substantial noncompliance. See, e.g., 42 U.S.C. § 1316(a) (Social Security, Supplemental Security Income and Medicaid). If existing administrative remedies are inadequate to ensure the recovery of money erroneously or wrongfully obtained by the States, those mechanisms should be improved rather than having the plain language of the FCA ignored.

POINT II

THE ELEVENTH AMENDMENT BARS THE FEDERAL COURTS FROM EXERCISING JURISDICTION OVER A FALSE CLAIMS ACT LAWSUIT BROUGHT BY A *QUI TAM* RELATOR AGAINST A STATE

The Eleventh Amendment functions as a limitation upon the federal court's authority under Article III of the Constitution. Under this Court's decision in *Seminole Tribe of Florida*, Congress is without authority, by virtue of the Eleventh Amendment, to allow a private citizen to sue a State in federal court under a statute enacted under Article I of the Constitution. Because the FCA was enacted under Article I and a *qui tam* relator is a private citizen suing a State, a suit by a *qui tam* relator against a State is barred.

The federal government asserts that the Amendment does not apply because the relator simply stands in its shoes. However, the statutory scheme of the FCA establishes that the relator asserts his own cause of action based upon a legal interest in the lawsuit that is separate from that of the United States.

Furthermore, Congress may not delegate the United States' right to sue a State to a private citizen relator. The States'

consent to suit in the "plan of the convention" by the United States does not extend to private citizen *qui tam* relators because there is no "compelling evidence" that States agreed to such suits in the constitutional design. Indeed, the United States and the relator have presented no such evidence with respect to a *qui tam* lawsuit.

A. The Eleventh Amendment Bars A Suit By A Private Citizen Against A State Under A Federal Statute, Such As The False Claims Act, Enacted Under Article I of the Constitution.

The Eleventh Amendment exemplifies the principle of state sovereign immunity that was implicit in the design of the Constitution when it was ratified. *See, e.g., Alden*, 119 S. Ct. at 2246-47 ("the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today"); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997).

The Amendment ensures that state sovereign interests are protected from suit in federal court by private citizens. It prevents a federal court from entertaining a lawsuit and issuing a judgment for money damages that must be paid out of a State's treasury. *Seminole Tribe of Fla.*, 517 U.S. at 58. The Amendment's "very object and purpose ... [was] to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers*, 123 U.S. 443, 505 (1887); *see also Alden*, 119 S. Ct. at 2247; *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy Inc.*, 506 U.S. 139, 146 (1993).

This Court has broadly interpreted the Amendment. Since 1890, it has been construed to prevent a private citizen of the *same State* (as well as a citizen of another State or a foreign State) from suing the State in federal court. *Hans v. Louisiana*,

134 U.S. 1 (1890). With only two exceptions, neither of which apply to the FCA,⁵ a private citizen is prevented, as a consequence of the Eleventh Amendment, from seeking any relief in federal court against a State or a State agency. *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144; *Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468, 480 (1987); *Edelman*, 415 U.S. at 662-63; *Ex parte New York*, 256 U.S. 490, 497 (1921).

Consequently, the Eleventh Amendment prevents Congress from authorizing a private citizen to sue a State in federal court under a statute enacted under Article I of the Constitution. *Florida Prepaid*, 119 S. Ct. at 2205; *Seminole Tribe of Fla.*, 517 U.S. at 72-73. Because there is no dispute that "the FCA was enacted under Article I of the Constitution," a lawsuit brought by a private party against a State arising under the FCA should be barred by the Eleventh Amendment. *Stevens*, 162 F.3d at 223 (Weinstein, J., dissenting).

⁵ First, a State may consent to be sued by expressly waiving its immunity. *Alden*, 119 S. Ct. at 2258; *Seminole Tribe of Fla.*, 517 U.S. at 65; *Atascadero*, 473 U.S. at 238; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Second, Congress may enact appropriate legislation under § 5 of the Fourteenth Amendment to enforce the provisions of the Fourteenth Amendment and therein expressly authorize a suit by a private party against a State. *Alden*, 119 S. Ct. at 2267; *Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. —, —, 119 S. Ct. 2199, 2205 (1999); *Seminole Tribe of Fla.*, 517 U.S. at 55, 59, 65-66; *Atascadero*, 473 U.S. at 246.

B. The Qui Tam Relator Does Not "Stand In The Shoes" Of The United States.

The United States is not prevented by the Eleventh Amendment from suing a State in federal court.⁶ According to the federal government, the *qui tam* relator's suit is also not barred by the Amendment because the relator "stands in the shoes" of the United States which is "the real party in interest." The argument is wrong because it is based upon an incorrect analysis of the role of the relator in the FCA statutory scheme.

It has long been recognized that in a *qui tam* action the relator "states that he sues *as well* for the state *as for himself*." *Black's Law Dictionary* 1251 (3d ed. 1969) (emphasis in original). This rule continues to apply to the FCA.

The original FCA statute provided a financial reward for "the person bringing said suit and *prosecuting it to final judgment*." Act of Mar. 2, 1863, ch. 67, § 6, 12 Stat. 698 (emphasis added). The statute now provides that "[a] person may bring a civil action for a violation of section 3729 *for the person* and for the United States Government." 31 U.S.C. § 3730(b) (emphasis added).

Those courts which have rejected a State's Eleventh Amendment immunity on the theory that the *qui tam* relator has no interest in the FCA lawsuit because he or she acts merely as the "agent" or "delegee" of the United States, which is the only "real party in interest" in the FCA lawsuit, misconstrue the statutory

⁶ This Court has explained that, with respect to the United States, there has been "a surrender of this [Eleventh Amendment] immunity in the plan of the convention." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-323 (1934) (quoting *The Federalist* No. 81); see also *West Virginia v. United States*, 479 U.S. 305, 311 (1987); *United States v. Texas*, 143 U.S. 621, 644-45 (1892).

scheme.⁷ The fact that the United States may receive the largest share of the proceeds or that the "focus of the Act is on exposing fraud on the government and recovering resulting government losses" (*United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998)), does not mean that the *qui tam* relator is without his own legal interest. See also *Long*, 173 F.3d at 883-84; *Foulds*, 171 F.3d at 290.

The structure of the FCA ensures, in two principal respects, the *qui tam* relator's status as a separate party with an independent interest in the FCA lawsuit. First, the statute provides the relator with a significant financial interest in the judgment or settlement. It provides that the relator's share of the damages and penalties "shall be not less than 25 percent and not more than 30 percent of the proceeds." 31 U.S.C. § 3730(d)(2). The relator is also entitled, if he prevails, to attorney's fees, costs and expenses from the defendant. 31 U.S.C. §§ 3730(d)(1), (2).

Second, the statute gives the relator a substantial right to prosecute the FCA lawsuit to final judgment or settlement. The

⁷ See, e.g., *Zissler*, 154 F.3d at 872 ("[T]he United States is the real party in interest because of its significant control over the course of the litigation and its dominant share of the proceeds thereof.... [T]he relator 'has no interest in the matter whatever except as [a common informer].'" (quoting *Marvin v. Trout*, 199 U.S. 212, 225 (1905)); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1215 (9th Cir. 1996) ("qui tam plaintiffs are merely agents suing on behalf of the [United States] government, which is always the real party in interest"); *United States ex rel. Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2d Cir.) ("In a qui tam action, the plaintiff sues on behalf of and in the name of the government and invokes the standing of the government resulting from the fraud injury.... The government remains the real party in interest, however, in the FCA suit."), cert. denied, 508 U.S. 973 (1993); *United States ex rel. Milam v. Univ. of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992) ("A qui tam relator is essentially a self-appointed private attorney general, and his recovery is analogous to a lawyer's contingent fee. The relator has no personal stake in the damages sought--all of which, by definition, were suffered by the government.").

FCA provides that, if the Government decides not to intervene at the outset or move to dismiss the action, the relator has the "right" to prosecute the action through final judgment or settlement. 31 U.S.C. §§ 3730(b)(4)(B), (c)(2)(A), (c)(3). The relator is then responsible for all aspects of the case, including discovery, trial preparation and trial. *See Foulds*, 171 F.3d at 293 ("It is Foulds--not the United States as sovereign--who controls all strategic litigation decisions in the case ... and it is Foulds who maintains sole responsibility for financing the litigation and for its costs.").

Although the United States can seek to intervene at a later stage of the proceedings, the federal government must show "good cause" to do so. 31 U.S.C. § 3730(c)(3). In addition, when the United States intervenes at a later stage, it does so "without limiting the status and rights of the person initiating the action." 31 U.S.C. § 3730(c)(3). If the Government intervenes and attempts to settle the case, the court must hear any objections by the relator to the proposed settlement. 31 U.S.C. § 3730(c)(2)(B). *See Gravitt v. General Electric Co.*, 680 F. Supp. 1162, 1165 (S.D. Ohio) (upholding relator's objection to government's proposed settlement and allowing relator to proceed with the FCA action despite government's position), *dismissed without op.*, 848 F.2d 190 (6th Cir.), *cert. denied sub nom. General Electric Co. v. United States*, 488 U.S. 901 (1988).⁸

⁸ The Courts of Appeals are divided as to whether, if the relator wishes to settle the case where the federal government has not intervened, the United States is entitled to review and, if appropriate, veto the proposed settlement. *Compare Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154, 158-60 (5th Cir. 1997) (government has power to veto settlement because the United States is a real party in interest even if it does not control the FCA suit), *with United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 723 (9th Cir. 1994) (federal government's consent to dismissal is only required during the initial 60-day period (or any extensions of that period) when the federal government decides whether or not to intervene in the FCA lawsuit).

Thus, according to the scheme of the FCA, the *qui tam* relator does not "stand in the shoes of the government." Rather, as Judge Panner recognized in his opinion in *Rodgers*, *supra*:

This action was commenced, and is being prosecuted, by two private citizens. The United States was not consulted before this action was filed. It did not screen the claims before filing to ensure that prosecution was warranted, and it has since declined to prosecute this action in its own right.... The United States has little control over the conduct of this litigation, unless it intervenes as a party or by moving to dismiss the action.

Rodgers, 154 F.3d at 869 (Panner, D.J., dissenting) (footnote omitted).

C. This Court's Decision In *Hughes Aircraft Co. v. United States ex rel. Schumer* Supports The States' Eleventh Amendment Defense.

This Court's recent decision in *Hughes Aircraft* is entirely consistent with the State's Eleventh Amendment defense. It recognizes that the *qui tam* relator has a separate interest in the FCA lawsuit.

Hughes Aircraft was commenced and prosecuted by a relator based upon allegedly false claims submitted by the company between 1982 and 1984. Because the United States had declined to intervene or to move to dismiss the action, the FCA lawsuit was being prosecuted only by the *qui tam* relator. *Hughes Aircraft*, 520 U.S. at 943 n.2. Under the provisions of the FCA in effect when the conduct occurred, the relator's suit would have been dismissed because the suit was based on information the government had received. *Id.* at 952. However, the relator did not sue until after 1986 and, as a result of the 1986 FCA

amendments, the relator's suit might be allowed. The question presented to and decided by this Court was whether the 1986 amendment was retroactive.

In holding that the amendment was not retroactive, the *Hughes* Court reasoned that a suit by the relator stands on a different footing from a suit by the United States. Therefore, even though the federal government's alleged injury was the same, the fact that the relator could not sue the company prior to 1986 but might be able to sue it after 1986 changed the substance of the cause of action. *Id.* at 948. Justice Thomas explained the basis for this conclusion:

As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good....*Qui tam* relators are thus less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc.

Id. at 949 (footnote omitted); *see also id.* at 949 n.5 ("That a *qui tam* suit is brought by a private party 'on behalf of the United States,' ... does not alter the fact that a relator's interests and the Government's do not necessarily coincide"); *Long*, 173 F.3d at 884 ("[T]he procedural question of in whose name the suit must be brought is distinct from the substantive legal question whether the plaintiff has a cause of action.") (citation omitted).

Thus, *Hughes Aircraft* stands for the proposition that the *qui tam* relator has a separate legal interest in the FCA lawsuit from that of the United States. Consequently, he stands as a private party who has commenced and is prosecuting a lawsuit against a State without the State's consent to suit.

D. The States Did Not, In The "Plan Of The Convention," Consent To Be Sued By A Private Qui Tam Relator Who Has A Separate Legal Interest In The False Claims Act Lawsuit.

Even if the *qui tam* relator is considered to be "standing in the shoes" of the federal government, the Eleventh Amendment would still bar the relator's lawsuit. The States did not consent to be sued, in the "plan of the convention," by a private *qui tam* relator whom the United States designates to assist it under the FCA.

The Constitution establishes a system of "dual sovereignty." *Gregory*, 501 U.S. at 457; *see also Alden*, 119 S. Ct. at 2247. Under a system of dual sovereignty, this Court must find *compelling evidence* of a waiver of sovereign immunity before it concludes that the States' surrender of immunity in the "plan of the convention" to the United States included suits commenced and prosecuted by private citizens on behalf of the federal government. *See Alden*, 119 S. Ct. at 2255 ("In exercising its Article I powers Congress may subject the States to private suits ... only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design."). The federal government, however, has put forth no evidence at all to show that the States intended, at the time of ratification, to consent to be sued by *qui tam* relators who prosecute lawsuits on their own behalf as well as on behalf of the federal government.

In *Blatchford* this Court strongly indicated that the States' waiver of immunity to the United States does not extend to private parties who sue a State "on behalf" of the United States. *Blatchford* held that Alaska Native villages could not sue a State in federal court and that the jurisdictional provision authorizing a suit by a tribe, 28 U.S.C. § 1362, did not abrogate the States' Eleventh Amendment immunity. Because the United States is

authorized in appropriate cases to sue a State as the trustee of the tribe, the tribes argued, *inter alia*, that Congress had enacted through 28 U.S.C. § 1362 "a general delegation of the authority to sue on the tribes' behalf from the Federal Government back to tribes themselves." *Blatchford*, 501 U.S. at 783.

The *Blatchford* Court rejected the tribes' argument. Justice Scalia expressed serious doubt that Congress had the authority to circumvent a State's sovereign immunity by delegating to a tribe the power to sue a State on behalf of the United States:

We doubt, to begin with, that that sovereign exemption *can* be delegated -- even if one limits the permissibility of delegation (as respondents propose) to persons on whose behalf the United States itself might sue. The consent, 'inherent in the convention,' to suit by the United States -- at the instance and under the control of responsible federal officers -- is not consent to suit by anyone whom the United States might select....

Id. at 785 (emphasis in original).

Considered together, *Alden* and *Blatchford* are entirely supportive of the States' argument that the *qui tam* provisions of the FCA violate the Eleventh Amendment because there has been no showing that the States' consent in the "plan of the convention" extended to private *qui tam* relators.

In *Stevens*, the Second Circuit reasoned that *Blatchford* is inapposite because the tribes were seeking to sue in their own behalf for payment of money to themselves and not, as here, on behalf of the United States. *Blatchford*, however, cannot be so easily distinguished. As Judge Silberman wrote in *Long*:

It seems to us that permitting a *qui tam* relator to sue a state in federal court based on the government's exemption from the Eleventh Amendment bar involves just the kind of delegation that *Blatchford* so plainly questioned.... The problems inherent in expanding the states' consent to suit by the United States to suits 'by anyone whom the United States might select,' ... are no less troublesome where, as here, the injury on which the suit is premised is a pecuniary injury to the United States.

Long, 173 F.3d at 882 (citations omitted); *see also id.* at 883 ("[T]he United States' very ability to sue as the tribes' trustee, which was unquestioned in *Blatchford*, depended on an injury to the United States as sovereign when injury was inflicted on the tribes.... It does not seem reasonable, therefore, to distinguish *Blatchford* as an anti-delegation principle applicable only where the 'injury' is an injury to someone other than the United States."); *Foulds*, 171 F.3d at 293 (same); *Rodgers*, 154 F.3d at 869 (Panner, J., dissenting) (same); *Stevens*, 162 F.3d at 224 (Weinstein, J., dissenting) (same).

In sum, the *qui tam* relator cannot sue a State under the FCA through a fiction that he simply "stands in the shoes" of the federal government. If the United States determines that it must pursue litigation against a State, it may not sit on the sidelines and allow the *qui tam* relator to assume the unpalatable task of prosecuting an FCA lawsuit against a State. In the event this Court finds that a State is a "person" subject to suit under the FCA, it must then conclude that the *qui tam* lawsuit is barred by the Eleventh Amendment.

CONCLUSION

The decision and order of the Second Circuit should be reversed in its entirety.

Dated: Albany, New York
September 3, 1999

Respectfully submitted,

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IN THE
Supreme Court of the United States

STATE OF VERMONT AGENCY OF NATURAL RESOURCES,
Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.* JONATHAN STEVENS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE
NATIONAL GOVERNORS' ASSOCIATION, NATIONAL
CONFERENCE OF STATE LEGISLATURES, COUNCIL
OF STATE GOVERNMENTS, NATIONAL LEAGUE OF
CITIES, NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY/COUNTY MANAGEMENT
ASSOCIATION, AND U.S. CONFERENCE OF MAYORS
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a State is a "person" subject to liability under the False Claims Act.
2. Whether the Eleventh Amendment bars a *qui tam* action against a State.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compelling interest in legal issues that affect state and local governments.¹

The question whether States are subject to suit under the False Claims Act is of utmost importance to *amici*. *Amici* respectfully submit that the court of appeals profoundly erred when it held that subjecting States to suit under the Act does not result in an "alteration of 'the usual constitutional balance of federal and state powers.'" Pet. App. 20a (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). On the contrary, as Judge Weinstein observed in his dissent, exposing States to treble damages and substantial civil penalties "distorts the dynamics of our federal system, denigrates the traditional role of congresspersons as bridges between their state communities and the national executive branch, and undermines cooperative relationships between federal and state agencies." *Id.* at 32a.

The correctness of Judge Weinstein's view is corroborated by the position taken by the United States in this Court in an analogous case seven years ago. The question in *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992), was whether the federal government had waived its sovereign immunity from liability for civil fines imposed by a State for violations of federal environmental laws. In support of its successful contention that Congress had not waived federal immunity with the requisite clarity,

¹ Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

the United States argued that "payment of such civil penalties would plainly alter 'sensitive federal-state relationships,' and should thus trigger a particularly rigorous application of the clear statement rule." Reply Br. of United States, Nos. 90-1341 and 90-1517, at 3 n.2 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). See also Br. of United States, Nos. 90-1341 and 90-1517, at 16 ("where the asserted waiver would subject the federal government to penal laws, courts require a particularly clear statement in order to find that a statute phrased in general terms waives federal sovereign immunity") (citing *Missouri Pac. R.R. Co. v. Ault*, 256 U.S. 554 (1921)).

The Eleventh Amendment issue presented in this case—whether FCA suits are barred by the States' sovereign immunity—is also of utmost importance to *amici*. This Court's recent Eleventh Amendment jurisprudence has reaffirmed the vital role of state sovereign immunity in preserving the federal-state balance. The holding of the court of appeals that *qui tam* relators principally advance the interests of the United States, and thus share the United States' extraordinary power to sue States in federal court, is irreconcilable with the realities of FCA litigation. More fundamentally, it disregards the Constitution's reservation to the States of "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden v. Maine*, 119 S.Ct. 2240, 2247 (1999).

Because of the importance of these issues to the preservation of the federal-state balance, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. A State is not a "person" under 31 U.S.C. § 3729(a) and therefore cannot be sued by relators under the False Claims Act. This Court has long recognized that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989) (citations omitted). In *Will*, the Court explained that "[t]his approach is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." *Id.* The Court has further held that it is "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 65 (citation omitted). These principles foreclose a reading of the FCA that permits *qui tam* actions against States.

The court of appeals' conclusion that subjecting States to *qui tam* actions does not alter the federal-state balance rests on a one-sided view of the federal system and an unrealistic assessment of the workings of the False Claims Act. *Qui tam* suits fundamentally alter the federal-state balance in a number of ways. First, as plaintiffs, "*qui tam* relators are different in kind than the Government." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). Rather than being motivated by the public good, they act "under the strong stimulus of personal ill will or the hope of gain." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (citation omitted).

Relators are thus highly unlikely to drop their lawsuits in circumstances in which federal and state officials are

most likely to resolve differences in a mutually agreeable manner. Moreover, the existence of a *qui tam* action undermines the constructive role that members of Congress can play in brokering the resolution of disagreements between federal and state officials. See Pet. App. 74a-76a (dissenting opinion).

The punitive sanctions imposed by the False Claims Act—treble damages plus substantial civil penalties—buttress the conclusion that making States suable under the Act fundamentally alters the federal-state balance. This Court has held that subjecting States to liability for compensatory damages effects such an alteration, see *Will*, 491 U.S. at 65; subjecting States to treble damages and civil penalties necessarily has the same result. Indeed, when States have sought to impose civil penalties on the United States, it has forcefully argued that “payment of such civil penalties would plainly alter ‘sensitive federal-state relationships,’ and should thus trigger a particularly rigorous application of the clear statement rule.” Reply Br. of United States at 3 n.2, *United States Dept. of Energy v. Ohio*, 503 U.S. 607 (1992) (Nos. 90-1341 & 90-1517).

Even if the ordinary rules of statutory construction are applied to § 3729(a), there is no basis for concluding that States are suable “persons” under the False Claims Act. See 1 U.S.C. § 1 (Dictionary Act definition of “person” does not include States). That the Act uses the term “person,” as the court of appeals put it, to “categorize both those who may sue and those who may be sued,” Pet. App. 21a, does not alter this conclusion. The fact that States are persons under § 3730(b)(1) and can therefore bring actions under the FCA does not mean that the term “person” has the same meaning when it is used in § 3729(a). Sections 3729 and 3730 of the Act have fundamentally different purposes. As this Court has explained, the presumption of consistent meaning is “not

rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the same act with different intent.” *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). And the Court has expressly recognized that whether the term “person” includes a sovereign depends upon whether the “statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage.” *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979).

The court of appeals also relied on § 3733(a)(1), which authorizes the Attorney General to issue a civil investigative demand whenever there is “reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation.” Although the CID provision defines “person” to include a State, see 31 U.S.C. § 3733(l)(4), it does so only “[f]or purposes of this section.” *Id.* § 3733(l). If, as the court of appeals believed, the term “person” as used in § 3729 included States, there would have been no need for the separate definition in the CID provision. Moreover, the CID provision demonstrates that Congress was able to include States within the coverage of specific provisions of the FCA when it wished to do so. That it did not provide this definition when it simultaneously amended § 3729 demonstrates that it did not intend to subject States to suit.

The legislative history is no more supportive of the court of appeals’ construction of the statute than the statutory text. That Congress enacted the FCA to “‘stop[] the massive frauds perpetrated by large contractors during the Civil War,’” Pet. App. 24a-25a (citation omitted), says nothing about whether the FCA subjects States to

suit. The fact that Congress' concerns included "instances of fraud by state officials in the procurement of military supplies for state troops," Pet. App. 25a, likewise fails to support that conclusion, as the House Report expressly noted that the frauds in question were carried out for the officials' "personal aggrandizement," and not for the States. *Government Contracts*, H.R. Rep. No. 37-2, pt. ii-a, xxxix (1861). Nothing in the legislative history supports the conclusion that States themselves were engaged in fraudulent acts or that Congress intended to subject States to suit.

Finally, the court of appeals erred in relying on post-enactment legislative history, specifically, part of a sentence in the Senate Report which asserts that proper defendants under the FCA include "States and political subdivisions thereof." S. Rep. No. 99-345, at 8, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. This Court has consistently treated Congress' post-enactment expressions of the meaning of a statute with skepticism. *See Wright v. West*, 505 U.S. 277, 295 n.9 (1992). None of the cases cited in this passage involved FCA suits against States. Moreover, none of the cases involved whether Congress has subjected States to suit at the instance of a private person. This brief, conclusory passage in the Senate Report is entitled to no weight.

2. Even if a State is a person subject to liability under the FCA, the Eleventh Amendment bars a *qui tam* suit against a State. The Eleventh Amendment prohibits a suit by a citizen against a State. While the States consented to suits by the United States as part of the constitutional plan, they did so with the expectation that this power would be exercised by politically accountable officials of the Executive Branch.

Section 3730(b) expressly recognizes that a *qui tam* relator is a "private person" and thus is a citizen for

purposes of the Eleventh Amendment. And the Court has explained that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes*, 520 U.S. at 949. A *qui tam* relator is simply not an official of the United States, but rather a private citizen who is subject to the Eleventh Amendment.

Furthermore, absent intervention by the United States it is the relator who controls the litigation. Thus, a *qui tam* action remains a "suit in law . . . commenced or prosecuted against one of the United States" by a citizen. U.S. Const. amend XI. Moreover, even where the United States takes over the suit, a *qui tam* relator has the right to continue as a party, and the right to a hearing on a government motion to dismiss or settle a case. *See* 31 U.S.C. § 3730(c). These rights demonstrate that the relator and the United States are distinct parties with frequently divergent interests in FCA litigation. A *qui tam* relator is, in short, a citizen whose suit against a State is barred by the Eleventh Amendment.

ARGUMENT

STATES ARE NOT SUBJECT TO SUIT UNDER THE FALSE CLAIMS ACT

In recent times, the Federal Government has increasingly sought the cooperation of the States to administer a wide range of programs. The statutes and regulations governing such programs, however, are often highly complex and unclear. *See, e.g., Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 44 n.14 (1981). Until recently, disputes between state or local officials and their federal counterparts over the interpretation of these federal laws were customarily resolved in a manner consistent with the

scheme of "‘cooperative federalism.’" See *New York v. United States*, 505 U.S. 144, 167 (1992) (citation omitted). In most instances, informal mechanisms of negotiation between federal agency and state officials settled the matter. See Pet. App. 80a-82a (Weinstein, J., dissenting). In other instances, members of Congress have helped to mediate such disputes. See *id.* at 74a-77a. Indeed, while federal grant programs commonly contain mechanisms by which the Federal Government can seek compliance (such as auditing, reporting, monetary sanctions and withdrawal of state program authority, see *id.* at 79a), the Federal Government rarely uses formal sanctions. See Daniel J. Elazar, *American Federalism: A View from the States* 182 (3d ed. 1984).

The court of appeals' holding that a State is suable for treble damages at the behest of private parties is antithetical to this system of cooperative federalism. See *United States ex rel. Dunleavy v. Delaware County*, 123 F.3d 734, 738-39 (3d Cir. 1997) (court of appeals declines to dismiss FCA suit despite settlement between federal and county officials). As explained below, the court erred when it construed the term "person" as used in the False Claims Act's liability provisions to include a State. The court then compounded its error by holding that the Eleventh Amendment does not bar a private citizen from bringing a *qui tam* suit against a State. The judgment of the court of appeals should therefore be reversed.

I. A STATE IS NOT A "PERSON" UNDER THE FALSE CLAIMS ACT'S LIABILITY PROVISIONS

The False Claims Act subjects "[a]ny person who" commits any of seven prohibited acts related to the submission of a false or fraudulent claim to the United States to "a civil penalty of not less than \$5,000 and not more

than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a). The Act does not define the operative term "person." Pet. App. 10a.

This Court has long recognized that "‘in common usage, the term ‘person’ does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.’" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989) (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941))); see also *United States v. United Mine Workers of America*, 330 U.S. 258, 275 (1947). In *Will*, the Court explained that "[t]his approach is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." 491 U.S. at 64. Thus, in *Will* the Court held that "a State is not a person within the meaning of § 1983," reasoning that the "common usage of the term ‘person’ provides a strong indication that ‘person’ as used in § 1983 likewise does not include a State." *Id.*

The Court has further held that it is "the ordinary rule of statutory construction that if Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’" *Id.* at 65 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). See also *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *United States v. Bass*, 404 U.S. 336, 349-50 (1971). As the Court has explained, "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the

critical matters involved in the judicial decision.’” *Will*, 491 U.S. at 65 (quoting *Bass*, 404 U.S. at 349).

The court of appeals acknowledged that “‘in common usage, the term “person” does not include the sovereign.’” Pet. App. 21a (quoting *Cooper*, 312 U.S. at 604-05). The court then committed two fundamental errors. First, it rejected the State’s contention that the *Will* clear statement rule applies, holding that “[i]n the FCA, we see no alteration of ‘the usual constitutional balance of federal and state powers’ such as to require application of the plain statement rule.” Pet. App. 20a. Second, it concluded that Congress intended to subject States to FCA suits on the basis of a tortured and unpersuasive analysis that falls far short of rebutting the ordinary presumption that the term “person” does not include a State.

A. The False Claims Act Fundamentally Alters The Federal-State Balance

The court of appeals’ conclusion that subjecting States to *qui tam* suits does not alter the usual constitutional balance of powers rests on a myopic view of the federal system and the workings of the False Claims Act. The court’s rationale for its conclusion—that “[t]he goal of the statute is simply to remedy and deter procurement of federal funds by means of fraud,” and that “States have no right or authority, traditional or otherwise, to engage in such conduct,” Pet. App. 21a—trivializes the issue, ignoring the highly corrosive effect such suits have on the federal system.²

² The same could have been said in every case in which the Court has applied the clear statement rule to protect the States from unintended liability. The States “have no right or authority” to violate constitutional rights. *Will* nonetheless held that the States were not “persons” subject to suit under Section 1983, recognizing that such liability would fundamentally alter the federal-state balance. See 491 U.S. at 64-66. The States likewise claim no authority

Qui tam suits fundamentally alter the federal-state balance in multiple ways. First, this Court has recognized that “[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.” *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997). *Qui tam* relators act “‘under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.’” *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)).

Because of their personal stake in the outcome, “[*q*]ui *tam* relators are thus less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc.” *Hughes*, 520 U.S. at 949. This, however, is exactly the situation in which federal and state officials can settle disputes through informal mechanisms in an expeditious and mutually satisfactory manner. See, e.g., Pet. App. 79a-85a. Moreover, as the dissent explained, Members of Congress “frequently intervene on behalf of their states and home communities to influence the policy positions and particular decisions of administrative agencies charged with implementing federal statutes.” *Id.* at 74a. “Let[ting] loose a posse of *ad hoc* deputies,” *United States ex rel. Milam v. University of Texas*, 961 F.2d 46, 49 (4th Cir. 1992), who are often motivated by “personal ill will or the hope of gain,”

to violate other congressionally created federal rights. This Court, however, has recognized repeatedly that the very act of subjecting States to suits for damages fundamentally alters the federal-state balance. See, e.g., *Alden v. Maine*, 119 S.Ct. 2240 (1999); *Atascadero*, 473 U.S. at 238-39.

Hess, 317 U.S. at 541 n.5, undermines Congress' own role in the process of resolving intergovernmental disputes and gravely harms the "cooperative federalism" that is essential to the effectiveness of federal, state and local governments.

The sanctions imposed by the False Claims Act buttress the conclusion that the statute fundamentally alters the federal-state balance. Section 3729(a) subjects an offending "person" to treble damages plus "a civil penalty of not less than \$5,000 and not more than \$10,000." Moreover, it is well settled that a civil penalty can be imposed for each separate false claim. See *United States v. Bornstein*, 423 U.S. 303, 309 n.4 (1976); see also *United States v. Halper*, 490 U.S. 435, 437-39 (1989) (government sought \$2,000 civil penalty under then-existing statute for each of 65 separate false claims for Medicare reimbursement when actual damages were \$585).

The False Claims Act's imposition of treble damages is also punitive in nature. See *United States ex rel. Long v. SCS Business & Tech. Inst., Inc.*, 173 F.3d 870, 877 (D.C. Cir. 1999).³ To be sure, in *Bornstein* the Court concluded that the False Claims Act's former liability provision, which imposed double damages, was remedial in nature. See 423 U.S. at 314-15. But the then-existing False Claims Act provided that a *qui tam* relator was

³ *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 46 F. Supp. 2d 546 (E.D. La. 1999), graphically demonstrates the FCA's punitive nature. There, the district court, while reducing the civil penalty, determined that the FCA required it to assess treble damages amounting to \$22.8 million against "a public school district responsible for educating children, many of them poor." *Id.* at 565. The damages were thus \$15 million more than the United States' actual damages. Equally disturbing, the relator's award was more than \$5.5 million, thus resulting in a massive redistribution of the school district's resources from the students to the relators. *Id.* at 56 (awarding relators 25% of the verdict).

entitled to half of the recovery. Thus, in most cases the Federal Government was only being made whole. See *Hess*, 317 U.S. at 540, 550. Moreover, while *Hess* rejected the contention that the double damages provision was a criminal sanction subject to the Fifth Amendment's double jeopardy clause, the Court acknowledged that "[p]unishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned." 317 U.S. at 551 (quoting *Brady v. Daly*, 175 U.S. 148, 157 (1899)).

In any event, it is beyond dispute that treble damages are a punitive sanction. See *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 639 (1981); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 912-13 (3d Cir. 1991); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 349 n.3 (S.D.N.Y.), *overruled by U.S. ex rel. Stevens v. Vermont*, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S.Ct. 2391 (1999). As the Court explained in *Texas Industries*, "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." 451 U.S. at 639.

If subjecting the States to liability for compensatory damages fundamentally alters the federal-state balance, see, e.g., *Will*, 491 U.S. at 64-65, then it is obvious that subjecting States to punitive sanctions (whether at the instigation of the United States or private parties) also alters the constitutional balance. Cf. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).⁴ Indeed, when States have sought to impose penalties on the United States, the United States has forcefully argued that "pay-

⁴ See also Br. Am. Cur. City of New York at 5-8 (discussing policy against imposing penalties on cities).

ment of such civil penalties would plainly alter 'sensitive federal-state relationships,' and should thus trigger a particularly rigorous application of the clear statement rule." Reply Br. of United States at 3 n.2, *United States Dept. of Energy v. Ohio*, 503 U.S. 607 (1992) (Nos. 90-1341, 90-1517) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). The Court has agreed, holding in *Dept. of Energy* that provisions of the Clean Water Act and Resource Conservation and Recovery Act, which authorized a suit "against any person (including . . . the United States)" and the district courts "to apply any appropriate civil penalties," were insufficiently clear to subject the United States to civil penalties. 503 U.S. at 615-20 (quoting 33 U.S.C. § 1365(a) and 42 U.S.C. § 6972(a)). Section 3729 of the False Claims Act, which makes no reference to States, provides even less of an indication of congressional intent to subject States to suit than the provisions which the Court found in *Dept. of Energy* insufficient to subject the United States to liability. And most significantly, the Court, in determining what rule of construction to follow, did not define the relevant activity as polluting in violation of federal and state law, but rather the impact of civil penalties on the United States' sovereign immunity.⁵

⁵ *Missouri Pac. R.R. Co. v. Ault*, 256 U.S. 554 (1921), is to similar effect. There, Congress provided that the Director General of Railroads "shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law" and "that the 'lawful police regulations of the several states' shall continue unimpaired." *Id.* at 563 (quoting Federal Control Act § 10 & § 15, 40 Stat. 451 (1918)). A state law directed that railroads pay their discharged employees full wages within seven days and provided that if payment was not made, the railroad was liable for wages on a continuing basis until they were paid.

The Court rejected the contention that the Director General was liable for penalty wages. The Court acknowledged that "[b]y these provisions the United States submitted itself to the various laws, state and federal, which prescribed how the duty of a common

As the foregoing demonstrates, an attempt by the United States to impose a penalty on a State fundamentally alters the federal-state balance. At least then, however, the suit is conducted by politically accountable officials. "Let[ting] loose a posse of" politically unaccountable "*ad hoc* deputies" to sue the States, *Milam*, 961 F.2d at 49, would mark an unprecedented intrusion into the federal-state relationship. Contrary to the reasoning of the court of appeals, the clear-statement rule and the presumption that a State is not a "person" therefore apply.

B. Even Under The Usual Standards Of Statutory Construction, The FCA Does Not Subject States To Suit

In reaching the conclusion that "the term '[a]ny person' in § 3729(a) is sufficiently broad to encompass the States," Pet. App. 30a, the court of appeals asserted that it was simply applying "the usual standards of statutory con-

carrier by railroad should be performed and what should be the remedy for failure to perform." 256 U.S. at 563. The Court held, however, that "there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligations imposed." *Id.* The Court further explained that while the United States "undertook as carrier to observe all existing laws . . . it did not undertake to punish itself . . . by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it." *Id.*

As the United States has explained, *Ault* stands for the proposition that "where the asserted waiver would subject the federal government to penal laws, courts require a particularly clear statement in order to find that a statute phrased in otherwise general terms waives federal sovereign immunity." U.S. Br. 16, *Dept. of Energy v. Ohio*. That view likewise rests on the recognition that allowing one sovereign to penalize another "would plainly alter 'sensitive federal-state relationships.'" Reply Br. of United States at 3 n.2., *Dept. of Energy* (citation omitted).

struction." *Id.* at 21a. As explained below, the court's effort at statutory construction is unpersuasive even assuming the inapplicability of the ordinary presumption regarding the meaning of the term "person." Moreover, the conclusions the court drew from history are not sustainable. In short, the court of appeals' holding cannot be justified under either approach to statutory construction.

The court began its analysis by noting that the False Claims Act uses the term person "to categorize both those who may sue and those who may be sued." Pet. App. 21a. The court then relied on the fact that States have brought suits under the *qui tam* provision, which, it believed, "clearly indicat[es] that [States] viewed themselves as 'persons' within the meaning of § 3730(b)(1)."⁶ Pet. App. 22a.

The court found "[f]urther confirmation that Congress viewed the States as persons who could be *qui tam* plaintiffs" in another 1986 amendment, Pet. App. 23a, which authorized the joinder of "any action brought under the

⁶ The court observed that a Senate Report on the 1986 FCA amendments had cited *United States ex. rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), which held that a *qui tam* action cannot be brought when the United States already possesses the information upon which the suit is based. See Pet. App. 22a. The Senate Report expressed its disapproval with *Dean* and the 1986 amendments overturned its holding to allow a *qui tam* suit on the basis of information in the United States' possession where the relator was the original source of the information. S. Rep. No. 99-345, at 12-13, reprinted in 1986 U.S.C.C.A.N. 5266, 5277-78. The Senate Report had also cited a resolution of the National Association of Attorneys General which had stated that "to prohibit sovereign states from becoming *qui tam* plaintiffs because the U.S. Government was in possession of information provided to it by the State and declines to intercede in the State's lawsuit, unnecessarily inhibits the detection and prosecution of fraud on the Government." *Id.* at 13, 1986 U.S.C.C.A.N. at 5278. In the court of appeals' view, "there was no question whatever that *qui tam* suits could be brought by the States." Pet. App. 23a.

laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730." 31 U.S.C. § 3732(b). The Senate Report described this section as "allowing State and local governments to join State law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence." S. Rep. No. 99-345 at 16, 1986 U.S.C.C.A.N. at 5281. In the court of appeals' view, "[s]ince intervention, other than by the [federal] government, is not allowed in a *qui tam* suit, Congress's provision for joinder of claims of a State must have been premised on the view that the State may be the *qui tam* plaintiff." Pet. App. 23a.

Based on its analysis of these amendments, the court concluded that it is "plain that the States are 'person[s]' within the meaning of § 3730(b)(1)" and can therefore be *qui tam* plaintiffs. Pet. App. 23a. Reasoning that "[a]bsent some indication to the contrary, we normally infer that in using the same word in more than one section of a statute . . . Congress meant the word to have the same meaning," the court concluded that States are also "'person[s]' within the meaning of § 3729(a) or § 3730(a)." Pet. App. 23a-24a.

The court's analysis is flawed in several respects. First, even if States are "persons" authorized to sue under Section 3730, it does not follow that they are also "persons" who are suable under Section 3729. Sections 3729 and 3730 have fundamentally different purposes, thus rendering the consistent meaning rule inapplicable. The Court has explained that "the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Atlantic Clean-*

ers & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932). And the Court has expressly recognized that whether the term "person" includes a sovereign depends upon whether "the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage." *Wilson*, 442 U.S. at 667. It is thus entirely consistent with the ordinary rules of statutory construction for States to be "persons" authorized to bring *qui tam* suits, but not "persons" subject to such suits.

Second, the court's reasoning ignores Congress' general instruction to the courts that "the word[] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.⁷ This definition clearly excludes the States from the ranks of persons liable under the False Claims Act.

The court of appeals' reliance on Section 3732(b), which authorizes the joinder of "any action brought under the laws of any State for the recovery of funds paid by a State," is likewise misplaced. The text of Section 3732(b) is susceptible to several interpretations, two of which say nothing about whether States are persons under Sections 3729 and 3730. As the D.C. Circuit explained:

[t]he more obvious reading of § 3732(b) . . . is that it authorizes permissive intervention by states for recovery of state funds (creating what is in effect an exception to § 3730(b)(5)'s apparent general bar on intervention by all other parties except for the United States). Or Congress might even have meant § 3732(b) to provide supplemental jurisdiction for

⁷ The Dictionary Act, 1 U.S.C. § 1, reflects the common understanding that the term "person" includes a corporation. While local governments are typically given corporate status, a sovereign, while enjoying corporate powers, is not a corporation. See, e.g., *Will*, 491 U.S. at 69 n.9.

a non-state relator to join a federal false claim action with an action to recover state funds under a *state qui tam* statute, which several states have enacted.

United States ex rel. Long, 173 F.3d at 880 (citing Cal. Gov't Code §§ 12650 *et seq.*; Fla. Stat. Ann. § 68.081-092) (other citation and internal parenthetical omitted). Indeed, in light of the many programs (such as Medicaid) which are jointly funded by the States and the Federal Government and the fact that a fraudulent or false claim affects both sovereigns, it is consistent with the principles of cooperative federalism to allow the federal courts to hear state law claims arising out of the same transaction.

The court of appeals relied on one other piece of statutory text, Section 3733(a)(1), which authorizes the Attorney General to issue a civil investigative demand whenever there is "reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation." As the court of appeals noted, the CID provision defines the term person as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State," 31 U.S.C. § 3733(l)(4), and defines a "false claims investigation" as "any inquiry conducted . . . for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law." *Id.* § 3733(l)(2); see Pet. App. 29a. According to the court of appeals, "Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the 'persons' who are suable under the Act." Pet. App. 28a.

The court ignored, however, that the definition Congress gave the term "person" applies only "[f]or purposes

of this section.” 31 U.S.C. § 3733(l). If the term “person” as used in the liability provision of the False Claims Act (§ 3729) included States, there would have been no need for the CID provision’s separate definition. Moreover, Section 3733(l)(4)’s reference to States demonstrates that Congress is able to express its intent to subject States to some of the provisions of the False Claims Act. Yet when Congress simultaneously amended Section 3729 in 1986 to delete the reference to “[a] person not a member of an armed force of the United States,” Congress provided no definition of the term person. 31 U.S.C. § 3729(a)(1). Surely if Congress had intended the broad definition of the CID provision to apply to Section 3729, it could have inserted that definition into the statute along with the other definitions it provided. *See id.* § 3729(b) & (c) (defining terms “[k]nowing and knowingly,” and “[c]laim.”). That it did not do so is a telling indication that it did not intend for States to be suable under § 3729(a). *See, e.g., INS v. Cardoza Fonseca*, 480 U.S. 421, 432 (1987) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (citation and quotations omitted). This rule has particular force, where, as here, the CID provisions were enacted concurrently with the amendment of Section 3729. *See Cardoza Fonseca*, 480 U.S. at 432.

Moreover, the court of appeals’ conclusion that “Congress would not have authorized such an investigation into whether States were engaged in violating the FCA unless States were among the ‘persons’ who are suable under the Act,” Pet. App. 28a, assumes too much. As States are not “persons” under Section 3729, by definition they cannot violate the FCA. Contrary to the reasoning

of the court of appeals, Congress did not enact the CID provision to authorize investigations into whether States are violating the FCA. Rather, States are subject to the CID provision because, given the large number of federal programs they administer, they will frequently have information relevant to a false claim submitted by a contractor or private person who receives federal funds. *See Long*, 173 F.3d at 877.

The text of the False Claims Act thus provides no support for the notion that States are “persons” subject to liability under the False Claims Act. Nor, contrary to the reasoning of the court of appeals, do any non-textual materials support its holding.

Indeed, the court’s analysis of the history surrounding the FCA’s enactment, which led it to conclude that States have been subject to it all along, is simply wrong. That Congress enacted the FCA to “‘stop[] the massive frauds perpetrated by large contractors during the Civil War,’” Pet. App. 24a-25a (quoting *Bornstein*, 423 U.S. at 309), may have justified reading the statute to include artificial entities such as corporations. It says nothing, however, about subjecting States to suit.

The conclusion that the 1863 Act did not subject States to liability is not altered by the fact that “among the concerns of Congress at the time were instances of fraud by state officials in the procurement of military supplies for state troops, the costs of which were ultimately borne by the United States.” Pet. App. 25a (citing *Government Contracts*, H.R. Rep. No. 37-2, pt. ii-a (1862)). The House Report expressly noted that the frauds were carried out for the officials’ “personal aggrandizement,” and not for the States. *Government Contracts*, at xxxviii-xxxix. The fraud committed by such officials was fully embraced by the 1863 Act’s provisions, which imposed both criminal

and civil liability on "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States." An Act to prevent and punish Frauds upon the Government of the United States, ch. 67, § 3, 12 Stat. 696, 698 (1863). The evidence thus does not support the conclusion that States themselves were engaged in fraudulent acts and the text of the 1863 act demonstrates that Congress did not intend to subject States to suit.

Finally, the court of appeals relied on post-enactment legislative history, the 1986 Senate Report, which purports to explain the "History of the False Claims Act and Court Interpretations." S. Rep. No. 345 at 8; 1986 U.S.C.C.A.N. at 5273. In particular, the report asserts that:

[t]he False Claims Act reaches all parties who may submit false claims. The term "person" is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof. Cf. *Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *Georgia v. Evans*, 316 U.S. 153, 161 (1942); *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

Id. (other citations omitted).

This Court has consistently treated Congress' post-enactment expressions of the meaning of a statute with skepticism. See, e.g., *Wright v. West*, 505 U.S. 277, 295 n.9 (1992) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") The above quoted language warrants similar skepticism.

First, none of the cited cases raised the issue of whether a State is a person subject to liability under the False Claims Act. Indeed, neither the Senate Report nor any

of the lower courts that have upheld state liability cite any decision between the Act's enactment in 1863 and the 1986 amendments in which States were sued under the Act.⁸ As this suggests, the notion that States are suable under the FCA is of recent vintage.

Second, two of the cases provide no support for the notion that States are suable "persons" under the FCA. *Monell* held that a municipal corporation is suable as a person under 42 U.S.C. § 1983. See 436 U.S. at 687-90. The term "person," however, has generally been viewed as not rendering States suable for damages. See, e.g., *Will*, 491 U.S. at 69 ("the phrase [person] was used to mean corporations, both private and public (municipal), and not to include the States"). And *Georgia v. Evans* held only that a State was a "person" for purposes of bringing a suit to recover damages it had sustained under the Sherman Act, 15 U.S.C. § 15, "as [a] purchaser[] of commodities shipped in interstate commerce." 316 U.S. at 162. The Court, however, has long recognized that this is a far different and easier question than whether a State is a suable "person" under a statute. See *Wilson*, 442 U.S. at 667 (citing *United States v. Knight*, 39 U.S. (14 Pet.) 301, 315 (1840)).

That leaves only *Ohio v. Helvering*, in which the Court held that a State that entered the business of selling alcoholic beverages was a "person" for purposes of the Internal Revenue Code. See 292 U.S. at 370. The statute

⁸ To amici's knowledge, the only pre-1986 FCA suit against a State is *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370 (5th Cir. 1980). There, however, the district court dismissed the suit, "holding that a state is not a 'person' subject to liability under the False Claims Act." *Id.* at 1371. On appeal, the Fifth Circuit vacated the district court's judgment on the ground that the court lacked subject matter jurisdiction because the suit was based on information which was in the United States' possession at the time it was filed. See *id.*

did not, however, subject States to suit at the instance of private parties. Moreover, in light of the numerous cases in which this Court has construed the term "person" not to impose liability on a State, and the absence of any textual indication in the FCA that Congress intended to do so, this snippet is too meager to support subjecting States to suit. *Cf. Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("evidence of congressional intent [to abrogate state sovereign immunity] must be both unequivocal and textual"). Indeed, the paucity of FCA suits against States prior to the 1986 amendments—notwithstanding the legislative history's assertion that States were already suable "persons"—demonstrates that the legislative history deserves no weight.

Congress' use of the term "person" is simply insufficient to subject the States to the False Claims Act's punitive sanctions of civil penalties and treble damages. And contrary to the court of appeals' reasoning, *see* Pet. App. 30a, the False Claims Act—post-1986—can no longer be viewed as being a remedial scheme. *See infra* 12-13. It is, of course, also the ordinary rule of construction that statutes which impose a penalty or forfeiture "are to be construed strictly," *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971) (quoting *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954)), and "that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.'" *Id.* (quoting *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362 (1905)). Thus, even under "the usual standards of statutory construction," Pet. App. 21a, it is clear that a State is not suable under the False Claims Act.

This does not leave the United States without remedies against the States. Rather, the United States has available an arsenal of common law remedies including fraud, breach of contract, breach of fiduciary duties, unjust en-

richment, payment under mistake of fact and negligent misrepresentation. *See* John T. Boese, *Civil False Claims and Qui Tam Actions* 1-36 (1997 Supp.); *see also United States ex rel. Zissler v. Regents of Univ. of Minn.*, 154 F.3d 870, 871 (8th Cir. 1998); *United States ex rel. Graber*, 8 F.Supp. 2d at 345. Indeed, the United States frequently uses these remedies "because the statute of limitations has expired on FCA claims." Boese, *Civil False Claims*, at 1-36. These remedies are fully adequate to protect the United States from a false claim made by a State.

II. THE ELEVENTH AMENDMENT BARS A QUI TAM ACTION AGAINST A STATE

Even if a State is a "person" subject to liability under the FCA, the Eleventh Amendment bars a *qui tam* suit against a State. While a suit commenced and prosecuted by the United States against a State is not prohibited by the Eleventh Amendment, *see United States v. Texas*, 143 U.S. 621, 646 (1892), the States, in forming the Union and consenting to suits against themselves by the United States, did so on the expectation that this weighty power would be exercised by politically accountable officials of the Executive Branch. Absent the United States' intervention in a suit under 31 U.S.C. § 3730(b)(4)(A), the suit is barred by the Eleventh Amendment.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."⁹ The Amendment embodies the understanding of

⁹ The Court has long recognized that the Eleventh Amendment also bars a suit against a State by a citizen thereof. *See Hans v. Louisiana*, 134 U.S. 1 (1890).

the Framers that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 n.1 (1991) (quoting Alexander Hamilton, *The Federalist* No. 81, 548-49 (J. Cooke ed. 1961)). As Madison explained, "[i]t is not in the power of individuals to call any state into court." 3 J. Elliot, *The Debates In the Several State Conventions on the Adoption of the Federal Constitution* 533 (2d ed. 1863) (quoted in *Blatchford*, 501 U.S. at 780 n.1). And John Marshall observed that "an individual cannot proceed to obtain judgment against a state, though he may be sued by a state." 3 Elliot, *Debates* at 555-56 (quoted in *Blatchford*, 501 U.S. at 780 n.1.) See also *Hans v. Louisiana*, 134 U.S. 1 (1890).

A *qui tam* action against a State runs headlong into the Eleventh Amendment's prohibition on the exercise of the federal judicial power. As Section 3730(b) expressly recognizes, a *qui tam* relator is a private person and thus a citizen for purposes of the Eleventh Amendment. That a *qui tam* action is "brought in the name of the Government," 31 U.S.C. § 3730(b), does not render a *qui tam* relator an official of the United States who is outside the scope of the Amendment. Section 3730 authorizes two distinct categories of suits under the FCA—one, which is commenced by the Attorney General, and the other, which is commenced by a "private person." Compare 31 U.S.C. § 3730(a) with § 3730(b). Moreover, a *qui tam* relator brings the action both "for the person and for the United States Government." *Id.* § 3730(b)(1). As the Court has recognized, "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes*, 520 U.S. at 949.

In short, a *qui tam* relator remains a citizen who is subject to the Eleventh Amendment.

Moreover, absent intervention by the United States in the suit under § 3730(b)(4)(A), a *qui tam* action remains, in the words of the Eleventh Amendment, a "suit in law . . . commenced or prosecuted against one of the United States" by a citizen. As the Fifth Circuit recently explained:

It is [the relator]—not the United States as sovereign—who controls all strategic litigation decisions in the case such as how, when and in what manner to make demands on a state, whether to sue a state, how far to push the state toward a jury trial in extended litigation, whether to settle with a state and on what terms; and it is [the relator] who maintains *sole* responsibility for financing the litigation and for its costs.

United States ex rel. Foulds v. Texas Tech Univ., 171 F.3d 279, 293 (5th Cir. 1999). See also S. Rep. No. 345, at 25, 1986 U.S.C.C.A.N. at 5290 ("If the Government takes over the civil false claims suit, the litigation will be conducted solely by the Government. If the Government declines, the suit will be litigated by the individual who brought the action."). Cf. *New Hampshire v. Louisiana*, 108 U.S. 76, 89 (1883) (Eleventh Amendment prohibits a suit by a State against another State where the prosecuting state and its attorney general "are only nominal actors in the proceeding").

The court of appeals rejected the State's contention that this suit is barred by the Eleventh Amendment, relying upon "[t]he interests to be vindicated, in combination with the government's ability to control the conduct and duration of the *qui tam* suit." Pet. App. 16a. According to the court of appeals, "[t]he real party in interest in a *qui tam*

suit is the United States," and the *qui tam* relator's interest "is less like that of a party than that of an attorney working for a contingent fee." *Id.*

The court's analysis is flawed on several counts. First, it ignores that a *qui tam* relator brings the action both "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). Second, it ignores that a *qui tam* relator retains substantial rights in the litigation even when the United States has intervened, including "the right to continue as a party to the action," *id.* § 3730(c)(1), and the right to a hearing on a government motion to dismiss or settle the case. *Id.* § 3730(c)(2)(A) & (B). As the Senate Report explains, these rights were created to "provide *qui tam* plaintiffs with a more direct role not only in keeping abreast of the Government's efforts and protecting his [sic] financial stake, but also in acting as a check that the Government does not neglect evidence, cause unduly [sic] delay, or drop the false claims case without legitimate reason." S. Rep. No. 345 at 25-26, reprinted in 1986 U.S.C.C.A.N. at 5290-91.

Moreover, "[i]f the Government proceeds with the action, it . . . shall not be bound by an act of the person bringing the action." 31 U.S.C. § 3730(c)(1). This further demonstrates that a relator and the United States are distinct parties. In short, a *qui tam* relator is a separate party in the litigation with interests that frequently diverge from those of the United States. *See Hughes*, 520 U.S. at 949; *United States ex rel. Dunleavy v. Delaware County*, 123 F.3d at 738-39 (relator continues to prosecute FCA action notwithstanding settlement between federal and county officials).

Nor is the court's analogy to a lawyer working for a contingent fee persuasive. Clients are typically bound by the actions of their lawyers. *See* 31 U.S.C. § 3730(c)(1).

Moreover, a lawyer typically does not have the right to prosecute a suit without the client's authorization, or to obtain a hearing to object to the client's desire to dismiss the suit, *see id.* § 3730(c)(2)(A), or to obtain a hearing to determine whether a settlement agreed to by the client is "fair, adequate, or reasonable [to the lawyer] under all the circumstances." *Id.* § 3730(c)(2)(B). And as the D.C. Circuit explained, it is quite odd that the client would need to show "good cause" to intervene in its own lawsuit. *Id.* § 3730(c)(3); *see Long*, 173 F.3d at 886.

As the foregoing demonstrates, *qui tam* relators are separate parties from the United States who seek to vindicate interests which do not necessarily coincide with those of the Federal Government. And contrary to the reasoning of the court of appeals, Congress has intentionally provided relators with legal rights to challenge the decisions made by the Executive Branch's politically accountable officials.

Blatchford makes clear that, absent intervention by the United States, a relator's suit against a State is subject to the Eleventh Amendment. While the States surrendered their immunity from suits by the United States as part of the plan of the convention, *see* 501 U.S. at 782 (citing *United States v. Texas*, 143 U.S. 621), the terms of the surrender did not include subjecting themselves to suits by "a posse of *ad hoc* deputies," *Milam*, 961 F.2d at 49, who have no obligation to act in the public interest.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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September 3, 1999

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.*
JONATHAN STEVENS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR *AMICI CURIAE* ORLEANS PARISH
SCHOOL BOARD, LOUISIANA STATE SCHOOL
BOARD ASSOCIATION, LOUISIANA STATE
SCHOOL SUPERINTENDENTS ASSOCIATION,
MISSISSIPPI ASSOCIATION OF SCHOOL
SUPERINTENDENTS AND MISSISSIPPI SCHOOL
BOARDS ASSOCIATION IN SUPPORT
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INTEREST OF THE AMICI CURIAE

Amici Curiae Orleans Parish School Board ("the Board"), the Louisiana State School Board Association, the Louisiana State School Superintendents Association, the Mississippi School Boards Association, and the Mississippi Association of School Superintendents are vitally interested in the Court's resolution of this case.¹ The Court's decision is likely to have a direct impact on the continued economic viability of public school systems nationwide.

Recent events justify this concern. The Board was cast in judgment in a *qui tam* suit filed under the False Claims Act, 31 U.S.C.A. §§ 3729-3733 (West Supp. 1999) ("the FCA"). See *United States ex rel. Garibaldi v. Orleans Parish School Board*, 46 F. Supp. 2d 546 (E.D. La. 1999). The relators, two of the Board's internal auditors, alleged that the Board had been allocating a disproportionate share of federal dollars, compared to local dollars, to fund its unemployment compensation and workers' compensation programs. This allocation was based on a methodology that had been recommended by a third party contractor and reviewed annually by a national accounting firm for more than a decade. Nonetheless, a jury determined that this accounting technique fraudulently overcharged the federal government over a ten year period in the amount of \$4.6 million for unemployment compensation and \$3 million for workers' compensation.

Under the FCA's mandatory trebling provisions, those "compensatory" damages were tripled. In addition, under the FCA's mandatory civil penalties, the court felt compelled to assess the minimum of \$5000 "per claim" against the 1570 reimbursement requests made over the years by the Board.

1. Neither counsel for the Petitioner nor counsel for the Respondent authored this brief in whole or in part. No person or entity, other than the amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. See Supreme Court Rule 37.6.

Finally, with the addition of mandatory attorneys' fees, the ultimate judgment exceeded \$31 million. Both the Board and the relators appealed the judgment.² The United States Department of Justice had originally declined to intervene in the suit³ and specifically refused to be involved in the appeal.

Contemporaneously with the litigation, but entirely separate from it, the United States Department of Education has been attempting to obtain reimbursement for the same "overcharges." In an OIG audit, the Inspector General found that for the years 1992-96 the Board overcharged \$2.6 million for the unemployment compensation program; it said overcharges in workers' compensation, if any, were *de minimis*. The report did not mention fraud.

As a result of the Orleans Parish School Board litigation, all of the amici herein are concerned for their members. Because the *qui tam* relators in the Board's case used public records to develop a theory of accounting fraud, among other reasons, amici are concerned they could become easy prey for enterprising bounty hunters who will subject school systems — supposedly "deep pockets" — to expensive litigation that could impair if not cripple them in achieving their mission of educating our youth. Moreover, amici are concerned that the apparent overlap with available administrative remedies of the

2. Responding to the Board's post-trial motions, the trial court reduced the total judgment to slightly more than \$22 million, still a substantial imposition. The Court, after assessing 1570 claims at a \$5000 civil penalty each, for a total of \$7,850,000, decided that a "penalty of \$100,000 is an adequate forfeiture, as the automatic trebling of the verdict as prescribed in the statute has already resulted in a judgment for \$15.8 million more than was actually falsely claimed by the [Board]." See *Garibaldi*, 46 F. Supp. 2d at 565. The court found the judgment, for "over four times the losses actually incurred" by the Government, to be "excessive." *Id.*

3. The Government has the option to intervene and to direct the course of the proceedings if it elects to intervene. See 31 U.S.C.A. §§ 3730(b)&(c) (West 1998).

U.S. Department of Education will subject them to a kind of double jeopardy.

Amici curiae are also concerned about the ongoing exposure to punitive FCA liability for another reason. Local governmental entities are particularly vulnerable to lawsuits by disgruntled employees intent on winning a share of the FCA's bounty. In recent years, the number of FCA actions filed against local public entities has increased. These suits expose taxpayers of local governments to litigation costs, the risk of harsh penalties, and the threat of disruption of federally funded government services. In the case of the Board and the other amici curiae, the costs are borne ultimately by public school students of all ages.

Unlike a private corporation, a local governmental agency enjoys a cooperative relationship with the federal government. The federal government provides funding for services that a local government, in turn, provides directly to its residents. The effect of FCA suits is to frustrate the cooperative relationship between the federal and local governments. The threat of disruption of services or the reticence of a local government's availing itself of federal funding because of its vulnerability to an FCA lawsuit for draconian damages are each impediments under which amici curiae must operate daily.

The Orleans Parish School Board is a "creature[]" of the Louisiana Constitution with [its] duties and obligations defined by statute." *Rousselle v. Plaquemines Parish School Board*, 633 So. 2d 1235, 1241 (La. 1994); see La. Const. art. VIII, § 9(A) (West 1996) (directing the legislature to "create parish school boards and provide for the election of their members"). The legislature created one parish⁴ school board for each parish. See La. Rev. Stat. Ann. § 17:51 (West 1982). It has entrusted the management of public schools statewide to the parish school boards. *Rousselle*, 633 So. 2d at 1241 (citing *Caddo Parish School Bd. v. Board of Elections Sup'r of Caddo Parish*, 384

4. Parishes are Louisiana's equivalent to counties. See 1 U.S.C.A. § 2 (West Supp. 1999).

So. 2d 448 (La. 1980)). Under Louisiana law, "[a]s administrators of public education, school boards are agencies of the state." *Id.*

While Louisiana caselaw deems the Board an agency of the state, the Court of Appeals for the Fifth Circuit has held that school boards in Louisiana are *not* arms of the state for purposes of Eleventh Amendment analysis. See *Minton v. St. Bernard Parish School Board*, 803 F.2d 129, 132 (CA5 1986). Consequently, should this Court resolve the case on the basis of the Petitioner's Eleventh Amendment immunity, the judgment would afford no protection to the Board and its many counterparts, leaving school boards and districts in many states vulnerable to FCA claims.⁵

5. Courts of Appeals have reached varying conclusions on the question whether a school board is an arm of the state for purposes of the Eleventh Amendment. The Tenth Circuit, in *Ambus v. Granite Board of Education*, 995 F.2d 992, 997 (CA10 1993) (en banc), denied Eleventh Amendment immunity to the Utah school districts. It likewise denied immunity to Kansas school districts, *Unified Sch. Dist. No. 480 v. Epperson*, 583 F.2d 1118 (CA10 1978), based upon the facts of each case. In *Bertot v. School District No. 1, Albany County, Wyo.*, 613 F.2d 245 (CA10 1979) (en banc), the court noted that the issue of Wyoming school district immunity under the Eleventh Amendment was not directly implicated, but assumed that the applicable test would compel a ruling against a finding of immunity. See *id.* at 248 n.3. Nearly all other courts considering the issue have refused to grant local school districts Eleventh Amendment immunity. See, e.g., *Lester H. ex rel. Octavia P. v. Gilhool*, 916 F.2d 865 (CA3 1990) (Pennsylvania school districts), *cert. denied*, 499 U.S. 923 (1991); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499 (CA11 1990) (Alabama school boards); *Rosa R. v. Connelly*, 889 F.2d 435 (CA2 1989) (Connecticut school boards), *cert. denied*, 496 U.S. 941 (1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (CA2 1986) (New York school districts); *Gary A. v. New Trier High School Dist. No. 203*, 796 F.2d 940 (CA7 1986) (Illinois school districts); *Travelers Indem. Co. v. School Bd.*, 666 F.2d 505 (CA11) (Florida boards of education), *cert. denied*, 459 U.S. 834 (1982); *Eckerd v. Indian River Sch. Dist.*, 475 F. Supp. 1350 (D. Del. 1979) (Delaware school boards);

(Cont'd)

Resolving the case on the Eleventh Amendment issue would leave many public entities at substantial risk of financial ruin. Similarly, a determination by this Court that the Petitioner cannot be deemed a "person" under section 3729 because it is an agency of a sovereign state would leave the same entities with substantial punitive exposure. The amici curiae agree with the Petitioner that the FCA does not apply to States. Rather, the purpose and intent of the FCA, as well as sound public policy, compel a ruling that public entities of all kinds cannot be "persons" under the Act.⁶

Blameless state and local taxpayers should not be mulcted, nor innocent school children deprived of educational opportunities, so that a *qui tam* relator might earn a handsome fee. Thus, the amici curiae urge this Court to reverse the judgment of the Second Circuit, direct that court to dismiss the claims against the Petitioner, and hold that the term "person," as used in the FCA, does not include public entities.

(Cont'd)

but see *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (CA9 1992) (granting Eleventh Amendment immunity to California school districts in light of "near total authority" exercised by state), *cert. denied*, 507 U.S. 919 (1993).

6. As the Court has recognized by granting the petition for certiorari in this case, a conflict among the circuits exists regarding various aspects of the FCA, namely, whether a public entity can be a "person" as that term is used in the statute, whether the Eleventh Amendment bars such suits against states, whether the penalty provisions are mandatory, and whether the FCA itself is punitive in nature. While many of the FCA defendants are either sovereign states or "arms of the state," still others that have fallen victim to the FCA's bounty hunters are public entities other than states. See, e.g., *United States ex rel. Chandler v. Hektoen Institute for Medical Research*, 35 F. Supp. 2d 1078 (N.D. Ill. 1999) (county); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998) (municipality).

SUMMARY OF THE ARGUMENT

The Court is presented with two grounds for reversing the judgment of the Second Circuit. First, there is a statutory basis for reversing the lower court's ruling that a State is included as a "person" defendant under the FCA. Second, there is a constitutional basis for determining that a State is not subject to liability under the FCA because of immunity from suit under the Eleventh Amendment. Based upon principles of judicial restraint espoused in the federal judicial system, the Court should resolve this case on the statutory basis and resort to the constitutional argument only if the Court resolves that the term "person" includes States.

This determination will allow the Court to avoid the constitutional question unless it is necessary to the disposition of the case. Nor must the Eleventh Amendment issue be addressed first as one of subject matter jurisdiction. The Court has not held Eleventh Amendment immunity to be determinative of subject matter jurisdiction. Indeed, Eleventh Amendment immunity may be waived. Holding Eleventh Amendment immunity to be jurisdictional would be contrary to the maxim that the parties may not confer jurisdiction upon a court. It would allow a party to supply subject matter jurisdiction by waiver.

The FCA does not apply to States, or to municipalities or other public entities, for the simple reason that it mandates punitive damages. This Court has held that public entities are not subject to punitive damages because the retributive and deterrent effects of such damages are not visited upon the actual wrongdoers, but upon taxpayers and citizens.

The FCA originally included criminal sanctions, and, in its present form, mandates the trebling of compensatory damages and the imposition of additional civil penalties of \$5,000 to \$10,000 per claim. This Court has held the previous version of the FCA to be compensatory, but has not addressed the punitive nature of the present version. The Court, however,

has held other federal statutes that impose treble damages to be punitive. Likewise, the Court has recognized that civil penalties, like those imposed by the FCA in addition to treble damages, are punitive. The present version of the FCA imposes both treble damages and heavy civil penalties, in addition to attorney's fees. It is clearly punitive and does far more than compensate the Government for its losses.

Under this Court's precedent, public entities, including not just States but also municipalities and other local governmental entities, are not subject to liability for punitive damages unless Congress expressly provides otherwise. Such damages are intended to have retributive and deterrent effects, and those effects are not properly visited upon taxpayers and citizens who ultimately bear the cost of punitive damages. The taxpayers and citizens are innocent of any act to be punished or deterred. Instead, the only thing an award of punitive damages against such a public entity accomplishes is the creation of a risk to the financial integrity of the governmental entity and its ability to serve the needs of the citizenry. In the case of some statutes that award both compensatory and punitive damages, all a court need do in dealing with a public entity is award the compensatory damages. The FCA leaves no discretion or distinction for the award of compensatory damages but mandates that damages be trebled and that an additional civil penalty be assessed. In such a case, the immunity is from the statute, not from the damages. However, such immunity does not leave the Government without a remedy. For instance, in the case of the Board, administrative remedies are available and indeed are being utilized to address the same transactions that form the basis for the FCA action.

A finding that a State is not a "person" defendant under the FCA based purely on statutory interpretation, legislative history, and the traditional notion that the term "person" does not include a sovereign state will not necessarily assist a public entity such as the Board. Such public entities may not be considered to be

the State for purposes of determining Eleventh Amendment immunity or sovereignty issues. Thus, even though such a finding will free States from the threat of punitive damages under the FCA, the taxpayers and citizens served by municipalities and other local governmental entities will remain subject to the mandatory treble damages, civil penalties, and attorney's fees. This Court, however, can easily hold, under its prior precedent, that the FCA does not apply to States, municipalities, or other local governmental entities because it is punitive and does not expressly apply to such public bodies.

ARGUMENT

I. This Case is Properly Resolved on Statutory Grounds

The Petitioner, State of Vermont Agency of Natural Resources, asserts that it is not subject to liability in a *qui tam* action for two reasons: (1) because it is not a "person" that may be a defendant under 31 U.S.C.A. § 3729 (West 1998); and (2) because a *qui tam* action brought against a state or one of its agencies under 31 U.S.C.A. § 3730 (West 1998) is barred by the Eleventh Amendment. Principles of judicial restraint, however, counsel that the Court should first address whether the Petitioner may be a "person." The Court need not, and should not, reach the constitutional issue unless it first answers that question in the affirmative.

A fundamental principle of judicial restraint requires that federal courts avoid resolving constitutional questions in advance of the necessity of deciding them. *See, e.g., Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 445-46 (1988); *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). In *Harmon v. Brucker*, 355 U.S. 579 (1958), for example, the Court, recognizing its "duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case," "look[ed] first to [the] petitioners' nonconstitutional claim that respondent acted in excess of powers granted him by Congress." *Id.* at 581.

Similarly, in *Blair v. United States*, 250 U.S. 273 (1919), the Court explained that "[c]onsiderations of propriety, as well as long-established practice, demand that [it] refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of [its] judicial function, when the question is raised by a party whose interests entitle him to raise it." *Id.* at 279. The fundamental proposition that an Article III court should avoid deciding a case on constitutional grounds if it may resolve the matter by construing a statute persists today throughout the federal judiciary, where exceptions are few.⁷

In a recent False Claims Act case, *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (CA5 1999), the Court of Appeals for the Fifth Circuit chose to resolve a constitutional question, i.e., the Eleventh Amendment issue, before reaching a question of statutory interpretation. The *Foulds* court viewed Eleventh Amendment immunity as immunity from suit, and, therefore, deemed the immunity issue jurisdictional, requiring a threshold determination of the matter. *Id.* at 285-87.

In the same opinion, however, the Fifth Circuit recognized that whether Eleventh Amendment immunity is jurisdictional remains an open question in this Court. *Id.* The Court itself has explicitly so stated. *See Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, ___, 118 S. Ct. 2047, 2054 (1998). Bearing in mind that Eleventh Amendment immunity may be waived by a

7. This Court recognized one such exception in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). There, the Court concluded that special considerations mandated that it first resolve the constitutional questions. *Id.* at 122-23. At issue was the Speech or Debate Clause of the Constitution, whose purpose is to protect Members of Congress "not only from the consequences of litigation's results but also from the burden of defending themselves." *Id.* (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). No such issue is present here where, by contrast, a resolution of the case, on statutory grounds, in favor of the Petitioner yields the same result as would a determination of the constitutional issue.

State, thereby conferring federal "subject matter jurisdiction," but that subject matter jurisdiction cannot be stipulated by the parties, the amici curiae urge that the Eleventh Amendment is better viewed as providing a waivable immunity rather than as depriving a court of subject matter jurisdiction.

In light of the foregoing principles of judicial restraint, however, the Court need not reach this issue if the case can be resolved on statutory grounds. This point is illustrated by the District of Columbia Circuit in *United States ex rel. Long v. SCS Business & Technical Industries, Inc.*, 173 F.3d 870 (CA DC 1999), *supplemented*, 173 F.3d 890 (CA DC 1999), *petition for cert. filed*, 68 USLW 3116 (1999), another False Claims Act case. In a supplemental opinion on the merits, the court reached a result directly contrary to that of the Fifth Circuit in *Foulds*. See *Long*, 173 F.3d at 898. In the words of the District of Columbia Circuit, its approach "has the significant virtue of avoiding a difficult constitutional question. . . ." *Id.*

The *Long* court wrote its supplemental opinion after the Fifth Circuit issued *Foulds*. The District of Columbia Circuit, per Silberman, J., noted first that the *Foulds* court believed it was compelled to decide the Eleventh Amendment issue before reaching the statutory question. Because the *Long* court viewed *Foulds* as an implicit challenge to its jurisdiction, and because the court had not yet issued its mandate, it addressed the question whether it was *required* to decide the Eleventh Amendment issue first. See *Long*, 173 F.3d at 891.

The Eleventh Amendment bar on suits against the states in federal court "is not a garden variety jurisdictional issue." *Id.* at 892. Although the Amendment speaks in terms of the limits of the judicial power, a state can waive its Eleventh Amendment defense and consent to suit in federal court, and this Court has held that there is no obligation for a court to raise the issue *sua sponte*. See *Schacht*, 524 U.S. at ___, 118 S. Ct. at 2052-53.

Further, this Court has recognized that the Eleventh Amendment is a rather peculiar kind of jurisdictional issue. See *Calderon v. Ashmus*, 523 U.S. 740, __ n.2, 118 S. Ct. 1694, 1697 n.2 (1998) ("While the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings, we have recognized that it is not coextensive with the limitations on judicial power in Article III"). "The Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997). That this Court in *Calderon* thought itself obliged to decide first the case-or-controversy question suggests that the Eleventh Amendment, a less than pure jurisdictional question, need not be decided before a merits question. See *Long*, 173 F.3d at 894.

As the *Long* court explained, when a court decides that a statute does not provide for a suit against the states, there is no risk at all that the court is issuing a hypothetical judgment, i.e., an advisory opinion by a court whose very power to act is in doubt. Rather, the conclusion that the statute does not provide for suits against the states in federal court is, in effect, a resolution of the jurisdictional question in that the Eleventh Amendment can no longer be said to apply. See *id.* at 896. This Court, only two terms ago, adopted this reasoning in deciding a class action certification issue before reaching an asserted array of jurisdictional barriers, including ripeness, standing, and subject matter jurisdiction. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997), the Court explained that, because resolution of the class certification issues was "logically antecedent to the existence of any Article III issues, it [was] appropriate to reach them first." *Id.* at ___, 117 S. Ct. at 2244.

Here, the jurisdictional issue would arise solely because of the Court's assumption of the answer to the statutory question in favor of the Respondent. Because the Eleventh Amendment

issue would not exist but for that assumption, *see id.*, it is appropriate for the Court to decide the logically prior issue first. In fact, the Court has done so in other contexts. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 21-30 (1991) (holding that state officials sued in their individual capacities are persons under 42 U.S.C.A. § 1983 (West 1998), and then holding that the Eleventh Amendment presents no bar to such a suit); *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274, 278-80 (1977) (deciding first that the contention that municipalities were not persons under section 1983 was a merits question that had been waived, and then deciding that the Eleventh Amendment does not bar a suit against a municipality in federal court).

Based upon this Court's willingness to decide other statutory questions in advance of an Eleventh Amendment issue, and considering the salutary effect of avoiding a troublesome constitutional issue, amici curiae urge the Court to adopt the better-reasoned approach of the District of Columbia Circuit and resolve the case based upon the construction of the FCA.

II. The mandatory treble damages and penalty provisions, coupled with the attorney's fees provisions of the FCA, are punitive, and therefore the FCA should not apply to states, municipalities, or other local public entities

The Petitioner has argued that the Court should hold that the definition of a defendant "person" under the FCA does not include a State because the plain language of the FCA shows that it does not include a State, and the legislative history of the FCA does not indicate otherwise. Additionally, the Petitioner has set forth that the term "person" does not generally include a State, because the term "person" does not ordinarily include the sovereign. Contrary to the assertions of some courts that have reviewed the FCA's legislative history, there is no indication whatsoever that Congress intended to include a state or other public entity within the FCA statutory term "person."

In fact, Judge Silberman, for the court in *Long*, engaged in an exhaustive refutation of such assertions. *See Long*, 173 F.3d at 875-81. Particularly significant is the discussion of a so-called "smoking gun" piece of legislative history. The relators in *Long* pointed to a Senate Report issued at the time Congress amended certain provisions of the Act. That report, S. Rep. No. 345, 99th Cong., 2d Sess., at 8 (1986), purported to be purely descriptive legislative history of the FCA. According to the relators, the Senate Report confirmed that the Congress of 1863, 103 years earlier, intended to include states as defendant persons, an argument accepted by both the Second Circuit in this case and the Eighth Circuit in *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 874-75 (CA8 1998). Skeptical of the validity of such "postenactment legislative history," the *Long* court explained that this sort of "history" becomes of "absolutely no significance" when the subsequent Congress, or, more precisely, a committee of one House, "takes on the role of a court and in its reports asserts the meaning of a prior statute." *Long*, 173 F.3d at 878-79. This particular Senate Report appeared only to describe the way in which this Court had interpreted the FCA. The author of the report apparently had not read the cases carefully, as not one of the cases to which the report refers interpreted the term "person" under the FCA. *Id.* at 879. Moreover, "all three stand for the unremarkable proposition that governmental entities can be included in the term person when Congress so intends." *Id.* Courts that have held that the FCA includes states as persons have based their opinions not on the granite of Vermont but on the ever-flowing swamp of the Everglades.

Amici curiae, of course, agree with the Petitioner's position in this regard but add that the Court should find that the FCA does not apply to States, municipalities, or other local governmental entities because the FCA imposes punitive damages. Under this Court's authority, such entities are not subject to claims for punitive damages absent express Congressional intent to the contrary. This is so because these

damages are borne by the taxpayers who support the governmental entity or the citizens served by it. The retributive and deterrent effects of punitive damages are not achieved by aiming them at those taxpayers and citizens who, in the case of amici curiae, are public school children. Congress has expressed no such intent in the FCA.

A. The FCA, as amended in 1986 to include provisions for treble damages, civil penalties, and attorney's fees, provides for punitive damages.

The FCA, as amended in 1986, declares that a person who makes a false claim "is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . ." 31 U.S.C.A. § 3729(a)(7) (West Supp. 1999). The 1986 amendments thus dramatically increased the mandatory civil remedies from double to triple the amount of actual damages suffered by the United States, and increased the fines from \$2,000 per false claim to the heavier civil penalty of \$5,000 to \$10,000 per false claim. In addition, it provides for the award of attorney's fees. *See* 31 U.S.C.A. § 3730(d) (West Supp. 1999). Courts have assessed the civil penalty on a per claim basis. *See, e.g., United States v. Stella Perez*, 839 F. Supp. 92, 97-98 (D. Puerto Rico 1993), *reversed on other grounds*, 55 F.3d 703 (CA1 1995).

Although the double damages awardable under the pre-1986 version of the FCA have been called compensatory, *see United States v. Halper*, 490 U.S. 435, 449 (1989); *United States v. Bornstein*, 423 U.S. 303, 314-15 (1976), a review of the present version of the FCA, including its provisions for heavier civil penalties and treble damages, as well as attorney's fees, indicates that the FCA is truly punitive.⁸ The pre-1986 statute

8. A circuit split exists on the question whether the mandatory treble damages, increased fines, and attorney's fees instituted by the
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allowed a *qui tam* relator one half of the total recovery by the United States, and thus the award of double damages only made the United States whole. *Bornstein*, 423 U.S. at 315. This Court hypothesized, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), that Congress could have provided for treble damages in the FCA as it did in the antitrust laws and that such damages might be considered "punishment." *Id.* at 550.

With the 1986 amendments, the FCA provides for mandatory treble damages and a much heavier, mandatory civil penalty of \$5,000 to \$10,000 per alleged false claim. Further, the United States is made far more than whole by the treble damages and civil penalties. A *qui tam* relator is no longer entitled to recover one-half of that amount. Instead, he has the potential to receive from 15 percent to 30 percent of the amount recovered, depending upon whether the Government proceeds with the action. 31 U.S.C.A. §§ 3730(d)(1)&(2) (West Supp. 1999). Thus, even if the *qui tam* plaintiff recovers the maximum 30 percent, the Government receives 210 percent of the actual damages, and 70 percent of the civil penalties.

The Court of Appeals for the District of Columbia Circuit, in *Long*, explained that regardless whether the pre-amendment act was punitive, the 1986 amendments to the FCA, creating treble damages and heavier civil penalties, plus attorney's fees, created a form of punitive damages. *Id.* at 877. The amounts recoverable by the Government are clearly in excess of what is needed to make the Government whole.

Indeed, this Court, in *Smith v. Wade*, 461 U.S. 30 (1983), referring to Congress's ability to subject "persons" to punitive damages remedies, explained that other statutes enacted contemporaneously with 42 U.S.C. § 1983 illustrate that where

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1986 amendments to the FCA constitute punitive damages. While the Second Circuit in this case held the FCA provisions are not punitive, the District of Columbia Circuit, in *Long*, held that they are. The District of Columbia Circuit was right.

Congress wished to subject persons to a punitive damages remedy, it did so *explicitly*. *Id.* at 85. As an example, the Court cited the "False Claims Act, 12 Stat. 696, 698 (1863)," which "provided a civil remedy of double damages and a \$2,000 civil forfeiture penalty for certain misstatements to the government." 461 U.S. at 85. Thus, the Court, at least for illustrative purposes, has previously viewed the original version of the FCA as punitive.

When the FCA was enacted, it was intended as a criminal, and, consequently, punitive, statute. The *Long* court observed that in 1863 Congress made clear that it intended the FCA to include criminal, and, *a fortiori*, punitive, sanctions. The original statute provided for criminal penalties, including imprisonment for one to five years, for non-military "persons" convicted under the FCA, as well as for fines. *Id.* at 877-78.⁹

This Court has held in the context of other statutes that where treble damages are allowed as a civil remedy they are punitive rather than merely compensatory. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), a case filed under the Clayton Act, the Court stated that "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Id.* at 639; *see also Ross v. Bernhard*, 396 U.S. 531, 536 (1970) (noting that treble damages imposed for a securities violation are punitive). In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court favorably cited the Missouri Supreme Court's reasoning in *Hunt v. City of Boonville*, 65 Mo. 620 (1877) that a municipality could not be held liable for treble damages under a trespass statute because such damages are punitive. *Newport*, 453 U.S. at 261.

9. Of course, it is no more likely Congress contemplated that a local governmental entity be imprisoned than it did a sovereign State. Neither could Congress have contemplated that states or municipalities are military or non-military "persons" who would face incarceration. *See Long*, 173 F.3d at 876.

Likewise, the important characteristic of a civil penalty, as awardable under the FCA, is that it exacts punishment and is, in that way, equivalent to punitive damages in both purpose and effect. *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987). Similarly, the Court stated that fines under the Clean Water Act and the Resource Conservation and Recovery Act are "'punitive,' imposed to punish past violations." *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 613 (1992). The treble damages and heavy civil penalties provided by the FCA are no different. They are clearly punitive, returning to the United States far more than is necessary to compensate for any false claim, even after any bounty is paid to a *qui tam* plaintiff.

B. State and local governmental entities, absent express action of Congress, are not subject to liability for punitive damages; therefore, they cannot be "persons" under the False Claims Act, which imposes punitive damages

Without dispute, punitive damages, such as those provided by the FCA, are intended to punish past and deter future misconduct. *See Memphis Community School District v. Stachura*, 477 U.S. 299, 306 n.9 (1986) (purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior); *Newport*, 453 U.S. at 266-67; *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence). Such damages are not appropriately directed against a State, municipality, or other local public entity because they will not be borne by the malefactors who committed acts deserving of such punishment, but by innocent taxpayers who support, and citizens who are served by, the public entity. Those taxpayers and citizens have not committed and will not commit acts to be punished or deterred. This Court has held, based upon those circumstances, that absent express Congressional intent to the

contrary, liability for punitive damages is not to be imposed upon a municipality or other local government entity. Otherwise, innocent taxpayers shoulder the blame, paying such judgments through either increased taxes or a reduction in services. See *Newport*, 453 U.S. at 267.

Courts have since followed the rule of law set forth in *Newport* and denied the award of punitive damages against municipalities in a number of cases arising under federal law. See *Woods v. Graphic Communications*, 925 F.2d 1195, 1205 (CA9 1991); *Wulf v. City of Wichita*, 882 F.2d 842 (CA10 1989); *Barnier v. Szentmiklosi*, 810 F.2d 594, 598-99 (CA6 1987); *Haynesworth v. Miller*, 820 F.2d 1245 (CA DC 1987) (punitive damages may not be assessed against a municipality in a *Bivens* action).

As amici have previously stated, the damages awardable under the FCA are not merely compensatory, but punitive. The FCA has historically contained attributes of a criminal statute. The statute, however, does not expressly state that it applies to municipalities or other local or state governmental entities. In *Newport*, this Court held that absent clear expression to the contrary, Congress does not intend punitive damages to be assessed against public entities. *Id.* at 271. In that § 1983 civil rights case, the Court held that a municipality may not be held liable for punitive damages. See *Newport*, 453 U.S. at 271.

There, the trial court had upheld the award of punitive damages against the municipality. The court reasoned that the payment would focus taxpayer and voter attention upon the municipality's conduct and that this might produce accountability at the next election. *Id.* at 255. This Court expressly disagreed with that rationale. *Id.* at 268-70.

The Court ruled that the retributive and deterrent goals of punitive damages are not met when punitive damages are imposed on a municipality or other local public entity, because the punishment is visited upon the taxpayers, not upon the perpetrators of the conduct warranting such damages. This principle existed in the jurisprudence at the time that the civil

rights act at issue in *Newport* was enacted in 1871 (and likewise existed at the time the FCA was enacted in 1863).

The Court explained that by the time Congress enacted what is now section 1983, while courts generally understood that a municipality was subject to suit in tort, "this understanding did not extend to the award of punitive or exemplary damages. Indeed, the courts that have considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation." *Newport*, 453 U.S. at 259-60 (citing *City Council of Atlanta v. Gilmer & Taylor*, 33 Ala. 116 (1858); *Order of Hermits of St. Augustine v. County of Philadelphia*, 4 Clark 120, Brightly NP 116 (Pa. 1847); *McGrady v. President & Council of City of Lafayette*, 12 Rob. 668, 674 (La. 1846)) (further citations omitted).

Relying upon *McGrady*, the Court recognized that those who violate laws, disregard the courts, and wantonly inflict injuries are properly assessed punitive damages for their wrongdoing. "[Punitive damages], however, can never be allowed against the innocent." *Newport*, 453 U.S. at 261 (quoting *McGrady*, 12 Rob. at 677). In *McGrady*, because the punitive damages were to have been "borne by widows, orphans, aged men and women, and strangers," the Supreme Court of Louisiana disallowed their imposition. *Id.* at 677. Ultimately, damages imposed upon a public entity, i.e., the taxpayers, could not exceed that which would be sufficient to make the plaintiff whole. *Id.*

Courts have viewed awards of punitive damages against public entities as contrary to sound public policy "because such awards would burden the very tax payers and citizens for whose benefit the wrongdoer was being chastised." *Newport*, 453 U.S. at 263. For instance, in the case of the Board and the members of the other amici curiae, the windfall from the punitive damages award must be funded by the taxpayers who support the various school boards, making this burden particularly onerous. "Neither

reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.*

The liability of a State, municipality, or local governmental entity for the acts of its officials is not analogous to that of a corporation for the acts of its agents. Even were a public entity's officers to commit fraud, punitive damages may not be awarded against the entity.

[T]he relation which the officers of a municipal corporation sustain toward the citizens thereof for whom they act, is not in all respects identical with that existing between the stockholders of a private corporation and their agents; and there is not the same reason for holding municipal corporations, engaged in the performance of acts for the public benefit, liable for willful or malicious acts of its officers, as there is in the case of private corporations.

Newport, 453 U.S. at 261-62.

For the same reason that a punitive damages award cannot visit retribution upon a public entity, neither can it serve to deter future misconduct by the public entity. *Id.* at 268. This Court concluded in *Newport* that it is not at all clear that public officials would be deterred by knowledge that punitive damages would be awarded against their municipalities. In fact, it is reasonable to assume that such an award would be a matter of complete indifference to a public official. While the public entity might conceivably seek indemnification from the officials, indemnity may not be available against the public officials, and if even it were, the officials most likely could not pay the award. *Id.*

Similarly, the Court in *Newport* did not assume that corrective action, such as discharge of those appointed or excommunication of those elected, would fail to occur absent an assessment of punitive damages against the public entity. The more reasonable assumption is that responsible superiors, and

the electorate at large, may be assumed to be motivated not only by concerns for the public fisc but also for governmental integrity. *Id.* at 269.

This assumption is indeed true in the case of the Board, which now consists of elected members different from those serving at the time of the alleged acts giving rise to the judgment against the Board. The Board has since seen the arrival of two new school superintendents and has replaced many administrative personnel. The imposition of punitive damages upon the present board for transgressions occurring in the past may indeed have an unintended consequence. The electorate may vote out of office the very officials who have brought about change based upon the public perception that the present board members are responsible for the acts that brought about the punitive damages to be borne by the electorate.

The absence of liability under the FCA decidedly does not allow public entities to abscond with federal funds with impunity. For instance, in the case of the Board, the General Education Provisions Act, 20 U.S.C.A. §§ 1221-1234h (West 1990), unlike the FCA, sets forth an administrative claims procedure that expressly allows recovery against state or local educational agencies. *See* 20 U.S.C.A. § 1234(b) (West 1990). Significantly, this Act does not permit the imposition of punitive awards such as the trebling of damages, the heavy civil penalties, and the attorney's fees allowed by the FCA. Thus, it does not result in the loss of services necessitated by an award of such damages.

Additionally, it does not allow a relator to collect a bounty, and thus does not encourage a *qui tam* plaintiff to prey ultimately upon the taxpayers and citizens served by the Board. Moreover, the actual perpetrators of a fraud on the Government remain subject to state and federal criminal laws outside of the FCA. A holding that the FCA does not apply to States, municipalities, or other local public entities will not give *carte blanche* to such entities to submit false claims. It will merely move the

punishment for any such claims from the backs of the citizenry to those of the individual perpetrators of the fraud, leaving the public entity itself to pay only compensatory damages through other available remedies.

Although the benefits of an award of punitive damages against a public entity are questionable, "the costs may be very real." *Newport*, 453 U.S. at 270. The exposure to punitive damages "may create a serious risk to the financial integrity of these governmental entities." *Id.*; *Barnier v. Szentmiklosi*, 810 F.2d 594, 599 (CA6 1987). "The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on the services available to the public at large." *Newport*, 453 U.S. at 270-71. There is no doubt that, for a local public entity such as a school board, the treble damages and fines imposed by the FCA create a serious risk to the entity's continuing financial viability.

Notably, in the case of a public entity such as the Petitioner or the Board, there is neither allegation nor evidence that money went into an individual's pocket. Were it otherwise, an action under the FCA would be appropriately aimed at the individual wrongdoer. *Newport*, 453 U.S. at 267.

The claim against the Petitioner involves an accounting issue, as does the claim against the Board. Resolving accounting disputes with public entities has never been the FCA's target. Rather, the Act was aimed at fraud by contractors during the Civil War who sought to defraud the Government by providing either inferior products or services or no products or services at all. Those who steal from the government for their own financial gain were, and are, appropriate targets of an FCA suit. The punishment for such fraud is appropriately visited upon *them*, not upon taxpayers and citizens who fund and are served by a public entity. Because the FCA is a punitive statute, and because a public entity is not subject to liability for punitive damages,

the Court should conclude that governmental entities are immune from liability under the FCA.

In *Newport*, the Court was required to determine only that the punitive damages aspects of section 1983 did not apply to a municipality. Other relief remained available under the statute. With respect to the FCA, however, the only relief available under the statute is punitive: treble damages; heavy civil penalties; and attorney's fees. In fact, the FCA does not authorize relief that is not punitive.

In such a case, where punitive damages are mandated and compensatory damages are not authorized, affording no discretion to reduce the damages to a non-punitive level, the immunity from punitive damages necessarily requires immunity from suit under the statute. For instance, a claim under RICO requiring mandatory punitive damages in the form of treble damages cannot be maintained against a municipality. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899, 914 (CA3 1991); *Pelfresne v. Village of Rosemont*, 22 F. Supp. 2d 756, 761 (N.D. Ill. 1998); *Massey v. City of Oklahoma*, 643 F. Supp. 81, 85 (W.D. Okl. 1986). Similarly, a claim for mandatory punitive relief under the FCA cannot be maintained against a State, municipality, or other local governmental entity.

Finally, in a different context, this Court has held that both substantive and procedural due process protection is required where a tribunal seeks to impose punitive damages on an alleged malefactor. For instance, determining the constitutionality of punitive damages requires consideration of the reasonableness of the award and the adequacy of the guidance from the court in cases tried to a jury. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 563 (1996); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-19 (1991).

It is doubtful, however, that a state or local governmental entity is entitled to such protection. Relying on *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), holding that States are not

persons under the Fifth Amendment, and thus are not entitled to due process protection, *see id.* at 323-24, courts have held that local public entities, too, are not entitled to constitutional due process protection. *See, e.g., Stanley v. Darlington County School Board Dist.*, 84 F.3d 707, 717 (CA4 1996) (a political subdivision is not a "person" protected by the Fourteenth Amendment); *City of East St. Louis v. Circuit Court*, 986 F.2d 1142, 1144 (CA7 1993) (municipalities cannot challenge an action on due process grounds because they are not "persons" under the due process clause); *Delta Special Sch. Dist. No. 5 v. State Bd. of Educ.*, 745 F.2d 532, 533 (CA8 1984) (political subdivision of a state cannot invoke Fourteenth Amendment due process protection).

While the Court of Appeals for the Third Circuit, in *In re Real Estate Title and Settle. Servs. Antitrust Litig.*, 869 F.2d 760, 765 n.3 (CA3), *cert. denied*, 493 U.S. 821 (1989), concluded that school boards are persons within the meaning of the Fifth Amendment and are therefore entitled to due process protection, the overwhelming majority view is that States and local public entities are entitled to no due process protection. Should the Court permit the FCA's remedies to be assessed against such entities, it will subject them to punitive damages without the due process protection afforded all other defendants targeted by such claims. Taxpayers and citizens who ultimately pay any punitive damages will not be protected by the due process afforded to an individual malefactor even though those taxpayers and citizens are undeniably innocent of any fraud.

When enacting and amending the FCA, Congress could not reasonably have intended such a result, one that affords greater protection to corporate persons and their shareholders than it does to individual taxpayers and public school children. Rather, such a result further demonstrates why States, municipalities, and other local governmental entities cannot be "persons" subject to liability under the FCA.

CONCLUSION

The liability of a public entity under the FCA is wholly inconsistent with the congressional purpose underlying that statute. The amici curiae have shown the devastating effects of huge punitive awards assessed against public school boards. They have demonstrated why such entities were never intended to fall within the scope of the FCA. Therefore, the Board and the other amici curiae respectfully urge the Court to reverse the judgment of the Second Circuit and hold that neither States nor other public entities may be deemed defendant "persons" as that term is used in the FCA.

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IN THE
SUPREME COURT OF THE UNITED STATES

VERMONT AGENCY OF NATURAL RESOURCES,
Petitioner,

v.

UNITED STATES, ex rel. JONATHON STEVENS,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICUS CURIAE*
NATIONAL WHISTLEBLOWER CENTER
IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS CURIAE NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center ("Center")¹ is a nonprofit, tax-exempt, non-partisan, charitable and educational organization dedicated to the protection of citizens and employees who "blow the whistle" and report misconduct. The Center assists whistleblowers who have been discriminated against for reporting violations of law and threats to public safety.

In addition to its involvement in whistleblower litigation, the Center remains active in public education and the advocacy of whistleblower protection. The Center sponsors and participates in public education programs and training seminars throughout the country. The Center also operates an attorney referral service for whistleblowers, with members in 33 states, and maintains an informative website at www.whistleblowers.org. The Center was previously admitted as an *amici* by this Court in *English v. General Electric*, 496 U.S. 72 (1990), *Haddle v. Garrison*, 119 S.Ct. 489 (1998) and *Beck v. Bellaza, et al.*, No. 98-1-01480 (1999).

The present case involves several issues that are integral to the Center's interests. Among those is Congress' plenary

¹Pursuant to Rule 37.6, the Center maintains that no monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief and that the Center's counsel authored this brief in its entirety. Counsel for all parties have consented to the filing of an *amicus curiae* brief by the Center in this matter.

authority to safeguard the federal treasury by enlisting the aid of citizen relators. This issue goes to the core of national authority.

SUMMARY OF THE ARGUMENT

This case involves an integral predicate question² that goes to the very heart of Congressional authority over wholly federal matters. The trail laid down by the various briefs filed on behalf of the Petitioner, will never lead this Court to the crux of this case. Rather, the Court itself must ask whether Congress' authority under the Constitution to manage and safeguard the federal fisc includes the authority to bring states within the jurisdiction of the False Claims Act. The text of the Constitution³ and this Court's decisions in *United States ex rel. Marcus v. Hess*⁴ and *United States v. Morris*⁵ resoundingly answer that question in the affirmative.

This case differs from sovereign immunity cases decided under Congress' Fourteenth Amendment powers to abrogate state sovereign immunity. In those cases, there is a

²See, e.g., *United States v. International Business Machines Corporation*, 517 U.S. 843, 867-68 (1996)(Kennedy, J. dissenting)(collecting cases).

³See U.S. Const., Art. IV, Sec. 3, Cl. 2 (the "Property Clause")("Congress shall have the power to dispose of and make all needful rules and regulations respecting ... property belonging to the United States"); and U.S. Const., Art. I, Sec. 9, Cl. 7 (the "Appropriations Clause")("No money shall be drawn from the Treasury but in consequence of appropriations made by law").

⁴317 U.S. 537 (1943).

⁵23 U.S. 246 (1825).

careful balance that must be maintained between how much sovereignty the states retain and how much they willingly relinquished by ratifying the Fourteenth Amendment. Here, the focus is not properly on whether the states are constitutionally immunized from liability for defrauding the federal government. Rather, as reiterated just last term in *Davis v. Monroe County Board of Education*,⁶ the Court should respect Congress' power to protect itself from those – including the states – who would defraud it. As a result, this case is first properly analyzed under the Spending and Property Clauses of the United States Constitution.

Under the Spending and Property clauses of the Constitution, the key inquiry is whether the states have "adequate notice"⁷ of their potential for liability. Because of Congress' constitutionally and historically broad powers over the purse and the property of the federal government – it is clear that the states have had more than "adequate" notice that they will be liable when they defraud the federal government.

In regard to the second question on which this Court has granted *certiorari*, this Court's prior decisions and the Congress' historic reliance upon relators and the legislative history of the False Claims Act, unquestionably established Congress' authority to utilize *qui tam* relators to act on behalf of the United States. To find unconstitutional Congress' authority to utilize *qui tam* relators to protect the public fisc and to enforce Congress' broad powers under the spending and property clauses of the U.S. Constitution would fundamentally disrupt the balance of power within our system of government.

⁶119 S.Ct. 1661, 1670 (1999).

⁷*Id.*

ARGUMENT

I. CONGRESS' WELL-ESTABLISHED AND PLENARY AUTHORITY IN THIS FIELD HAS GIVEN MORE THAN ADEQUATE NOTICE TO THE STATES

A. Congress' Spending Clause Power Includes The Power To Implement The False Claims Act's Enforcement Scheme

Unlike the statutes at issue in previous sovereign immunity cases,⁸ the federal False Claims Act is not designed to make states liable for abrogating individual, group or economic "rights." Rather, the False Claims Act goes to the heart, the very essence, of Congress' plenary authority to appropriate funds and safeguard the federal fisc and property of the United States.⁹

This Court has long recognized Congress' broad "power of the purse" to condition the states' receipt of federal funds upon their agreement to be bound by conditions attached to

⁸See, e.g., *Welch v. Texas Department of Highways*, 483 U.S. 468 (1987)(the Jones Act); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)(the Indian Gaming Regulation Act); *Alden v. Maine*, 119 S.Ct. 2240 (1999)(the Fair Labor Standards Act).

⁹See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-547 (1943).

receipt of those funds.¹⁰ The Court has distinguished the analysis in these "Spending Clause" cases from cases involving legislation created pursuant to Congress' Fourteenth Amendment authority.

Most recently, Justice O'Connor discussed how this type of spending legislation creates a relationship "in the nature of a contract" between the federal and state sovereigns.¹¹ This description of the relationship is most apt in the present context and better informs the kind of inquiry relevant here. Rather than being a legislative act that intrudes into traditional state spheres, the False Claims Act implicates questions about what we should expect from the states when they enter into a contractual relationship with the federal government.

Moreover, the False Claims Act is unique because of the nature and consequences of the relationship between the state and federal sovereigns when the states are receiving

¹⁰ See, e.g., *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). In "Spending Clause" cases, the Court employs an analysis which asks whether Congress has manifested a clear intent sufficient to put the states on notice that their acceptance of the funds will result in the voluntary waiver of their sovereign immunity. See, e.g., *Atascadero*, 473 U.S. at 247.

¹¹See *Davis v. Monroe County Board of Education*, 119 S.Ct. 1661, 1670 (1999). While the Spending Clause analysis goes further and requires that Congress act sufficiently to put states on notice when receiving funds, it is important to note that False Claims Act cases are much more closely analogous to this analysis than to the two-pronged analysis used when Congress acts pursuant to its Fourteenth Amendment, Section 5 authority.

federal money. Unlike other legislation, where the states' liability attaches as a result of activity incidental to the subject matter of the contract with the federal government, states' liability under the False Claims Act is a result of the states' fraud as to the very subject matter of the contract itself.¹²

Because the subject matter of False Claims Act litigation is federal money, subject matter in which the state has no interest without federal permission, the interest of the federal sovereign must remain above that of any contractor — whether a private individual or a state.

Just as this Court has been a fervent protector of state sovereignty where state interests are in jeopardy, it must now step forward and safeguard the inviolate nature of the federal

¹²The debates in the Senate concerning the False Claims Act support this interpretation. Senator Howard, the Act's sponsor, unreservedly stated that the "purpose" of the law was to stop the "defrauding and plundering of the government" and that the law covered "contractors and the agents of contractors." Congressional Globe, 37th Cong., 3d Sess., Feb. 14, 1863. Immunizing states from liability for "defrauding and plundering" the federal government defeats the primary purpose of the Act, overrides Congress' plenary authority to protect the property of the federal government, and is inconsistent with this Court's holding in *Hess*, which recognized that pilfering state treasuries that contain federal moneys was equally covered under the Act as a direct pilfering of the treasury. *Hess*, 317 U.S. at 544 (state treasuries which contain federal dollars "are as much in need of protection from fraudulent claims as any other federal money").

power to protect its own treasury. In *Alden v. Maine*,¹³ Justice Kennedy discussed how the federal government can overstep its bounds when Congress acts in such a way as to "blur the distinct responsibilities of state and national governments."¹⁴ The same principle applies here. A state cannot obtain immunity in order to improperly blur the distinction between federal and state responsibilities. When a state becomes a federal contractor, it has one responsibility — to refrain from defrauding the government of the union. Nowhere is any state function or inherent state responsibility implicated.

Thus, a state, when acting as a federal contractor, has no special immunities superior to Congress' explicit and inherent authority to protect the federal government — its revenues and its property — and the False Claims Act applies to all federal contractors alike, including state entities, state employees, and state corporations.

Under Spending Clause analysis, this Court simply asks whether the Congressional enactment at issue gives adequate notice to the states that their conduct may result in liability.¹⁵ In the present case, the states have raised questions about whether Congress adequately defined "person" so that the states could know that it is wrong and punishable for them to defraud the federal government. These technical arguments are disingenuous and have an absurd result. Without the protections of the False Claims Act and the private attorneys general who help the federal government enforce it, the states would be free to ignore the very terms of their contracts with

¹³119 S.Ct. 2240 (1999).

¹⁴See *Alden*, 119 S.Ct. at 2266.

¹⁵See *Davis v. Monroe County Board of Education*, 119 S.Ct. 1661, 1670 (1999).

the federal government and be unjustly enriched by federal dollars. This is an obvious attempt by the states to gain by judicial fiat what they have been either unwilling or unable to obtain in negotiating their federal contracts.

B. This Court's Consistent Interpretations of Congress' Powers Gave The States More Than "Adequate" Notice That They Will Be Liable For Fraud Against The Federal Government

The states have pursued the statutory construction question of whether they are "persons" under the False Claims Act to the exclusion of a common sense understanding of the history of both the False Claims Act and Congress' power under the Appropriations and Property Clauses of the Constitution.

The False Claims Act was intended to protect Congress' constitutional powers over federal revenue and property. This fundamental congressional authority to oversee the federal fisc has long been recognized by this Court.¹⁶ Likewise, the framers of the False Claims Act understood that corruption in the control of federal revenues or property could lead to the

¹⁶This is crucial to the instant case. Where Congress has passed legislation specifically designed to ferret out and punish fraud against the federal treasury, its authority is most broad. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-546 (1943) (discussing how this Court does not possess the veto power, particularly in this field, to nullify a provision of the False Claims Act).

destruction of the government itself,¹⁷ and set out to create a statute which put all purveyors of fraud on notice that their conduct will not be tolerated. Consequently, the *qui tam* provisions of the False Claims Act represent a constitutionally permissible exercise of Congress' powers under the Property¹⁸ and Appropriations¹⁹ Clauses of the United States Constitution to make all needful rules to protect the treasury. This Court *must* uphold Congress' power to hold states accountable when they chase ill-gotten federal largess.

The plain language of the Constitution itself extends Congress' plenary power over the treasury beyond merely the authority to attach conditions to the receipt of federal moneys.²⁰ This Court has repeatedly interpreted both the Property Clause and the Appropriations Clause in very sweeping terms, and has established that no actor can usurp Congress' authority to dictate the expenditure of Treasury funds.²¹

¹⁷ See H.R. Rep. No. 2, 37th Cong., 2d. Sess. (1862), at 41 ("No government that has ever existed can sustain itself with such improvidence ...").

¹⁸U.S. Const., Art. IV, Sec. 3, Cl. 2 (the Property Clause).

¹⁹U.S. Const., Art. I, Sec. 9, Cl. 7 (the Appropriations Clause).

²⁰See U.S. Const. Art. I, Sec. 9, Cl. 7; U.S. Const. Art. IV, Sec. 3, Cl. 2.

²¹Congress' authority over Treasury funds is "without limitation." *United States v. California*, 332 U. S. 19, 27 (1947) citing *United States v. County of San Francisco*, 310 U. S. 16, 29-30 (1940). This court has alluded to this notion as recently as last term; "No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the states for the (continued...)"

Further, in *Hess*, this court upheld Congress' broad authority – in the very context of the False Claims Act at issue here.²² The case is illuminating both because this Court discussed the nature of Congress' power in this area, and because Congress affirmed its support for that decision over 40 years later, in the 1986 amendments to the False Claims Act.²³

In *Klepps v New Mexico*,²⁴ this court noted the great breadth of congressional power over Federal property. There, the State of New Mexico sought a declaration that the Wild Free Roaming Horses and Burros Act exceeded Congress' power under the Property Clause. New Mexico also asserted that the Act²⁵ intruded on the state's "sovereignty, legislative authority ... police power and ... traditional trustee power over

²¹(...continued)

execution of the great powers assigned to it." *Alden v Maine*, 119 S.Ct. at 2265 (quoting *M'Culloch v Maryland*, 4 Wheat. 316, 424 (1819)). Furthermore, "Congress is vested with the absolute right to designate the persons to whom real property belonging to the United States shall be transferred, and to prescribe the conditions and mode of the transfer, and a state has no power to interfere with that right or to embarrass the exercise of it." *United States v Board of Commissioners of Fremont County Wyoming*, 145 F. 2d 329, 330 (10th Cir. 1944), cert. denied, 323 U. S. 804 (1944).

²²*United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

²³See, e.g., S. Rep. No. 99-345, "Legislative History – False Claims Act Amendments Act of 1986." Reprinted in 1986 U.S.C.C.A.N. at 5266-5303.

²⁴426 U.S. 529 (1976).

²⁵The Act prohibited interference with unclaimed horses and burros on both federal and private land.

wild animals." ²⁶ The Court rejected these arguments and used an "expansive reading" to find, in broad terms, that the Clause gives Congress the power to determine without limitations what are "needful" rules.²⁷

This Court has likewise read broad Congressional powers into the Appropriations Clause. In *O.P.M. v. Richmond*,²⁸ the court stated that:

"[t]he obvious practical consideration ... for this adherence to the requirement [of the Appropriations Clause] is the necessity, existing now as much as at the time the Constitution was ratified, of preventing fraud and corruption ... but the clause has a more fundamental and more comprehensive purpose ... to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of government agents or the individual pleas of litigants." ²⁹

This language supports the very purpose of the False Claims Act: to ferret out and deter frauds against the integrity of the federal treasury. The False Claims Act is a clear and necessary attempt to ensure that public funds are spent "according to the letter of the difficult judgments reached by

²⁶426 U.S. at 541.

²⁷*Id.* at 539.

²⁸496 U.S. 14 (1990).

²⁹*Id.* at 27-28.

Congress."³⁰ It is absurd for the states to argue that they are both unaware of this power and somehow immunized from liability when they try to usurp it and defraud the federal government.

II CONGRESS' EXPANSIVE AUTHORITY IN THIS FIELD INCLUDES THE POWER TO ENLIST THE AID OF CITIZENS TO PROTECT THE TREASURY

A. Suits Under The False Claims Act Are Suits By The United States And Not Private Actions

That a suit brought and controlled by a citizen in the name of the United States is not a private lawsuit is not novel. In 1825, in the case of *United States v. Morris*,³¹ this Court recognized and upheld the principle that the citizen, the relator, is not the legal actor but merely an agent of the government. In *Morris*, two officials of the port of Portland, Maine had reported to the federal marshal a shipper's acts of wrongdoing that were in contravention of the non-intercourse acts then in existence. Under the Collection Act of 1799, the informers were due one half of the forfeiture gained by the United States from the wrongdoer. In this instance, however, the forfeitures were remitted to the wrongdoers. The officials then brought a lawsuit in the name of the United States in order to recover their portion of the original forfeiture.

³⁰*Id.* See also *Hess*, 317 U.S. at 547 (upholding a provision of the False Claims Act because "the very fact Congress passed [the False Claims Act] shows that it concluded that other considerations of policy outweighed those now emphasized by the government ...").

³¹23 U.S. 246 (1825).

The defendant demurred on the ground that the remission of the forfeiture by the United States divested the officials of any interest in what would have been the proceeds of the forfeiture. The Court took this opportunity to discuss the nature of cases where a citizen brings a lawsuit in the name of the United States, and the principles enunciated there are very analogous to those involved in the present case.

The Court made clear that, when a citizen sues in the name of the United States, the citizen is not the legal party in interest, for "the United States are, *pro tanto*, trustees for them; but as to the forfeiting party, the government is the only legal actor."³² This involves two very important understandings. First, that the relator, even though in control of the litigation, has no vested rights – rather, they are "merely conditional and the forfeiture is to the United States."³³ Second, the relator is no more than an agent of the government who is rewarded *after the fact of the litigation* by the government. The reasoning in *Morris* is even more compelling here because the underlying claim is federal money whereas in *Morris*, the subject matter was money or property that did not originate in the federal treasury but came about as the result of a civil forfeiture.

³² *Id.* at 269.

³³ *Id.* at 290.

B. Congress' Use Of The *Qui Tam* Provisions In The False Claims Act Is A Valid Exercise Of Spending And Property Clause Authority

Any doubt over the validity of Congress' election to use *qui tam* relators and the notice-giving effect that had is put to rest upon a review of the original committee report relied upon by the framers of the False Claims Act.

As this report spells out, Congress was equally concerned with both fraudulent contractors and "irresponsible" civil servants.³⁴ After a thorough investigation, Congress had uncovered evidence implicating government employees in the "gross mismanagement," "total disregard for the interests of government," and the "total recklessness in the expenditure of the funds of the government."³⁵ In fact, Congress found "every reason to believe that there was collusion on the part of employees of the government to assist in the robbing of the treasury."³⁶

Consequently, Congress *needed* the assistance of the *qui tam* relators to protect the integrity of federal revenues and property from both unscrupulous contractors and federal employees. Congress' decision to use a *qui tam* relator in these circumstances is absolutely reasonable, especially in light of the fact that the very employees authorized to protect the federal treasury were robbing it.

Congress recognized that without the strongest checks on the fraudulent use of federal moneys, by both contractors

³⁴H. Rep. at 68.

³⁵*Id.* at 69.

³⁶*Id.*

and civil servants in league, the government itself might go bankrupt:

With such a state of things existing, if officers of the government, who should be imbued with patriotism and integrity enough to have a care of the means of the treasury, are ready to assist speculating contractors to extort upon and defraud the government, where is this system of speculation to end, and how soon may not the finances of the government be reduced to a [woeful] bankruptcy?³⁷

In addition to the committee report, the Supreme Court has also relied on the Senate debates published in the Congressional Globe as legitimate authority in interpreting the False Claims Act.³⁸ The sponsor of the bill, Senator Howard,³⁹ explained how the law was, in part, "based on" the "old-fashioned idea of holding out a temptation and 'setting a rogue to catch a rogue.'" The Senator also explained how the interests of the United States were being served by this "safest and most expeditious" method to bring "rogues to justice."⁴⁰ Likewise, the law *also* rewarded the altruistic and "vigilant" civil servant who would appropriately file a claim on behalf of the United States.⁴¹

Congress' utilization of *qui tam* relators to protect and advocate the interests of the United States is a reasonable and

³⁷*Id.* at 69.

³⁸*See Hess*, 317 U.S. at 544, note 8.

³⁹Cong. Globe, 37th Cong. 3d Sess., Feb. 14, 1863 at 952.

⁴⁰*Id.* at 956.

⁴¹*Id.* at 955 (Remarks of Senator Howard).

Carefully crafted response to the problem of fraud against the treasury. Because of its reasonableness, and pursuant to the plain language of the Constitution, the False Claims Act's use of action by relators on behalf of the United States is well within the authority granted to Congress under the Spending and Property Clauses of the Constitution.⁴²

C. Congress' Power to Use *Qui Tam* Suits and Relators Is Well Grounded In The History And Tradition Surrounding The Framing of The Constitution

From the earliest time, *our* union has faced the threat of fraud, and has taken actions to detect and punish that fraud. In so doing, the federal government has enlisted citizen agents in the battle to protect the federal treasury.

Consider the extraordinary step taken by the Continental Congress, in 1778, when it passed the following:

*"Resolved, That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any persons in the service of these states, which may come to their knowledge."*⁴³

This resolution contains two key clauses. First, it speaks of the "duty" to uncover and report fraud. Not merely the duty of

⁴²See, e.g., *Klepps*, 426 U.S. 529.

⁴³See Journals of Congress, July 1778 at 732.

government officers and employees – but the duty of "all inhabitants thereof." There can be no more clear statement by Congress as to its intent to enlist citizens to combat fraud. Neither can there be a more clear statement warning all whom would engage in such subversive activity.

Second, the resolution declares that the fraud that citizens are to be on watch for is that committed by any "officers or persons in the service of these states." The effect of this statement is twofold. On the one hand, it is clearly analogous to the False Claims Act in general, and the present case in particular. In both instances, Congress enlists citizens to specifically look for fraud being committed by the states. On the other hand – in direct contravention of much of the selected history typically cited in sovereign immunity cases today – it implies that Congress understood, over two centuries ago, that it had the authority to police the states with respect to fraud against the federal government *and used that authority in a very conspicuous manner* to which the states acquiesced. There can hardly be a more clear notice to the states that citizens will be used to detect fraud, and that the integrity of the treasury will be vindicated.

The Continental Congress' reliance upon citizens to assist in the protection of federal interests was nothing new. As this Court has, on more than one occasion, recognized:

Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of

years in England, and in this country ever since the foundation of our government.⁴⁴

Unquestionably, Congress has the authority to empower *qui tam* litigants to act on behalf of the United States in order to protect its interest as a Sovereign.

CONCLUSION

This case concerns a truism of American democracy: that "in free governments the rulers are the servants, and the people their superiors and sovereigns."⁴⁵ As has been recognized by this Court in *United States v. Morris* and *United States ex rel. Marcus v. Hess*, Congress has the power to authorize its citizens to act on behalf of the United States of America and to protect this country's vital interests. Nowhere is this power more apparent than under the Property and Appropriations Clauses of the Constitution.⁴⁶ Moreover, stealing is wrong. The states' underlying suggestion that they have had no notice of their fiduciary responsibility not to steal or misuse federal funds on its face is not credible.

⁴⁴*Hess*, 317 U.S. at 541, note 4, citing *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

⁴⁵ Benjamin Franklin, in Debates of the Constitutional Convention, July 26, 1787. Reprinted in 457 Formation of the Union: Documents, Government Printing Office, 1927.

⁴⁶See *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); U.S. Const., Preamble.

For the foregoing reasons, the decision of the Second Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1999

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICA
EX REL. JONATHAN STEVENS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF OF AMICUS TAXPAYERS AGAINST FRAUD
SUPPORTING RESPONDENT**

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STATEMENT OF INTEREST¹

Taxpayers Against Fraud is a nonprofit, tax exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state level. The organization has worked to publicize the qui tam provisions of the False Claims Act, has participated in litigation as a qui tam relator and as an amicus curiae, and has provided testimony to Congress about ways to improve the Act. Taxpayers Against Fraud's interest in this case is to support vigorous enforcement of the Act by contributing its understanding of the Act's proper interpretation and constitutional application.

INTRODUCTION AND SUMMARY OF ARGUMENT

The False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq.*, imposes civil liability on "any person" who makes a false monetary claim to the United States government. *Id.* § 3729(a). The Act authorizes the Department of Justice (DOJ) to initiate suits on behalf of the United States, over which it enjoys exclusive and plenary control. *Id.* § 3730(a). The Act also authorizes qui tam enforcement, providing that "[a] person may bring a civil action for a violation of [the Act] for the person and for the United States Government. The action shall be brought in the name of the Government." *Id.* § 3730(b)(1).

I. A qui tam suit raises no constitutional concerns under the Eleventh Amendment or associated principles of state sovereign immunity. "In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." *Alden v. Maine*, 119 S.Ct. 2240, 2267 (1999). The United States is a real party in interest in qui tam suits under the False Claims Act, which seek to vindicate the United States' sovereign and

¹ Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for a party. No person, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

proprietary interests. Because a qui tam relator sues on behalf of the United States, her suit qualifies as a suit by the United States for purposes of the states' immunity waiver. Any requirement that the United States' interests be advanced only by executive branch officials would run counter to the framers' original understanding.

II. States are "persons" subject to liability under the False Claims Act. Any contrary determination would apply to suits initiated by the Department of Justice as well as by relators, and thus would deprive the Department of its most effective weapon against fraud. Moreover, this interpretation is supported by conventional modes of statutory construction, including text, purpose, history, and established usage. And not only is the federalism-based "plain statement" rule this Court sometimes invokes to limit private actions against states inapposite here, but state liability under the False Claims Act actually preserves the traditional balance of federalism by precluding one state from siphoning into its own coffers some of the federal funds intended to benefit the entire country.

ARGUMENT

I. A QUI TAM SUIT CONSTITUTES A SUIT BY THE UNITED STATES FOR PURPOSES OF SOVEREIGN IMMUNITY DOCTRINE, AGAINST WHICH A STATE DEFENDANT HAS NO VALID ELEVENTH AMENDMENT DEFENSE

We begin with the incontestable premise that the states waived their erstwhile sovereign immunity from suits by the United States when the states joined the federal union. "[N]othing in [the Eleventh Amendment] or in any other provision of the Constitution prevents . . . a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 128, 140 (1965); see also, e.g., *Alden v. Maine*, 119 S.Ct. 2240, 2267 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.14 (1996). Because a qui tam action brought to enforce the False Claims Act asserts the United States' sovereign and proprietary interests, it qualifies for

the state immunity waiver for suits by the United States (hereinafter "US/p waiver").

A. The United States is a "Real Party in Interest" in Qui tam Suits Under the False Claims Act, Which Seek to Vindicate the United States' Sovereign and Proprietary Interests

The United States can act only through the agency of natural persons. In a qui tam enforcement scheme, Congress authorizes both public officials and private persons to assert the United States' interests by bringing suit "in the name of the Government." 31 U.S.C. § 3730(b)(1). As the lower courts have concluded,² the United States is a real party in interest in False Claims Act litigation whether the suit is initiated by a public prosecutor or a private relator.

First, when a person submits a false claim for payment as defined by the Act, the United States directly suffers the injury since the fraudulently obtained money is siphoned from the federal treasury. Thus the litigation asserts the United States' proprietary interest in protecting its own fisc, as well as its more abstract sovereign interest in enforcing its valid civil code against all entities within its regulatory jurisdiction. Indeed, state-engineered fraud directly threatens the national government's own interests just as much, and in much the same way, as if a state took possession of and claimed ownership to federal lands.

Second, qui tam litigation directly asserts, and thus either vindicates or extinguishes, these interests of the United States. The requirement that the action be filed "in the name of the United States" is not mere window-dressing; there is only one cause of action generated by any particular instance of fraud, and it

² See, e.g., *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154 (2nd Cir. 1993); *United States ex rel. Berge v. Board of Trustees of Univ. of Alabama*, 104 F.3d 1453, 1457 (4th Cir. 1997); *United States ex rel. Hall v. Tribal Development Corp.*, 49 F.3d 1208, 1213 (7th Cir. 1995).

belongs to the United States. No matter whether the first suit is brought by DOJ or a relator, claim preclusion bars subsequent DOJ or relator suits.³

Third, the predominant share of any monetary recovery accrues to the United States. Just as financial responsibility is a paramount factor in determining whether the defendant in a particular suit is "the state" or not, *see, e.g., Regents of the Univ. of California v. Doe*, 519 U.S. 425, 430 (1997), the promise of financial recovery should equally manifest the sovereign interest of a government plaintiff.

The fact that the relator is also defined as a "party" under the Act does not change the nature or diminish the extent of the United States' interest in the litigation. The relator sues for himself as well as the government only in the sense that, once filed, the action itself gives him an inchoate interest in the outcome of the litigation.⁴ And this interest is both derivative and contingent: derivative in the sense that the injury and cause of action are not his but rather those of the United States, and contingent in the sense that if he is not the first-filing plaintiff he never acquires any such interest.⁵ To be sure, if he is the first-filing plaintiff he then becomes a party to the litigation, perhaps even a real party in interest for some purposes. But the United States unquestionably

³ See Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 354 n.71 (1989).

⁴ See, e.g., 2 William Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND*, 1765-1769, at 437 (1979 ed.) ("[H]e that brings his action, and can bona fide obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body else. He obtains an inchoate imperfect degree of property, by commencing his suit; but it is not consummated till judgment . . ."). It is only in this inchoate sense that "by commencing the suit the informer has made the popular action his own private action . . ." *Id.*

⁵ This understanding dates back to the English *qui tam* tradition during the colonial period. See Note, *The History and Development of Qui Tam*, 1972 Wash. U.L.Q. 81, 84 n.18 ("The informer's rights to the penalty did not attach until the suit was instituted, whereupon his rights attached absolutely and to the exclusion of all other potential informers.").

remains a real party in interest as well, whose interests the suit purports to vindicate.⁶

B. Because The United States Is A Real Party In Interest, The Suit Qualifies As A United States Suit For Purposes Of The States' Immunity Waiver

A suit in which the United States is a real party in interest qualifies for the US/p waiver for two reasons. First, this Court has invariably applied such a real party in interest test in determining the "governmental status" of a litigant for purposes of immunity doctrine. Second, this test conforms to the historical rationales for the US/p waiver.

Many aspects of sovereign immunity doctrine turn on whether a "sovereign" is truly involved in the dispute, either as a defendant (in order to claim immunity in the first place) or as a plaintiff (in order to defeat an immunity claim due to a plan waiver). Whenever ambiguity has arisen as to whether the relevant

⁶ Indeed, even if one views the relator as "sharing" a portion of the United States' monetary interest in the litigation (typically 15-30%, determined only after-the-fact), this perspective does not preclude the relator from litigating on behalf of the United States for the portion he will ultimately share. The relator can obtain no recovery above and beyond what DOJ could obtain on the United States' behalf; his share merely reduces the amount recoverable by the United States that is ultimately returned to the federal treasury. This Court has previously held that the sovereign immunity waiver for United States suits still applies when a private party joins the United States in litigation if the private plaintiff seeks no greater relief than that already being sought by the United States. See *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (Eleventh Amendment inapplicable when the United States, a federal agency, and private companies were allowed to intervene as plaintiffs in an original action between two states); *Arizona v. California*, 460 U.S. 605, 614 (1983) (in a suit between two states in which the United States had intervened on behalf of Indian tribes, the tribes themselves allowed to intervene; because the tribes did not seek to raise any new claims, "our judicial power . . . is not enlarged" and state "sovereign immunity . . . is not compromised").

defendant or plaintiff should be considered a sovereign for doctrinal purposes, this Court has employed the same interest-based test.

Most frequently, this Court uses this test to determine whether a state is the true defendant in an action although it is not technically named as such. As this Court has emphasized many times, "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945) (citations omitted).⁷ In other words, a state counts as the defendant for purposes of sovereign immunity when it is the real party in interest, even if it is "represented" in the litigation (by dint of the plaintiff's pleading) by a state official or entity.

With respect to governmental plaintiffs, consider this Court's application of the states' waiver in the constitutional plan of their immunity from suit by sister states. Occasionally in a state-against-state suit it is unclear whether the plaintiff state seeks to vindicate its own sovereign or proprietary interests, or rather seeks merely to vindicate the interests of private persons. In such cases, this Court inquires whether the plaintiff state has a true governmental interest at stake in the litigation, and holds that the immunity waiver applies if the answer is yes.⁸

⁷ See also, e.g., *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997).

⁸ Consider, for example, the juxtaposition of *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), and *South Dakota v. North Carolina*, 192 U.S. 286 (1904). In *New Hampshire*, this Court held that sovereign immunity barred actions by the states of New Hampshire and New York against Louisiana to collect on bonds and coupons originally issued by Louisiana to its citizens, even after those citizens assigned their claims to the plaintiff states as invited by state law. Because the plaintiff states were only "nominal actors in the proceeding," 108 U.S. at 89, and the

The familiar real party in interest test makes sense in this particular context, for it dovetails with the premise of the US/p waiver. As this Court has repeatedly explained, the states entered into a set of mutually beneficial immunity waivers when they joined the Union.⁹ Each state took upon itself a reciprocal set of affirmative and negative obligations running to its sister states (e.g., aiding extraditions, eschewing import duties) and to the United States (e.g., holding federal elections, not obstructing federal instrumentalities). Each state desired to establish some way of enforcing the obligations its sister states owed to it. To this end,

real parties in interest were the private bondholders, this Court held that the plan waiver for sister-state suits was inapplicable and thus the actions violated both "the letter and the spirit of the Constitution." *Id.* at 91. By contrast, in *South Dakota*, this Court allowed South Dakota to sue North Carolina to recover for defaulted bonds originally owned by South Dakotans. The difference, this Court explained, was that the individuals gifted, rather than assigned, the bonds to their state such that South Dakota owned them outright rather than held them "as representative of individual owners." 192 U.S. at 310. South Dakota thus had a direct proprietary interest in the suit, and therefore its suit was not embarrassed by the Eleventh Amendment. *Id.* at 315-18. See *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-33 (1938) (unlike the action in *South Dakota*, the actions in New Hampshire were barred because "the State was not seeking a recovery in its own interest, as distinguished from the rights and interests of the individuals who were the real beneficiaries"); see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 n.12 (1972).

⁹ In both *Monaco v. Mississippi*, 292 U.S. 313 (1934), and *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Court distinguished between the United States and sister states as plaintiffs from foreign nations and Indian tribes as plaintiffs based on the presence of a mutual benefit from waiver. See *Monaco*, 292 U.S. at 330 ("The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates."); *Blatchford*, 501 U.S. at 782 ("What makes the States' surrender of immunity from suits by sister States plausible is the mutuality of the concession. There is no such mutuality with either foreign sovereigns or Indian tribes.").

each state insisted upon the right to sue its neighbors, waiving its own immunity from suit by those same neighbors in a "mutual concession" designed to promote the benefit of all. Similarly, each state desired to authorize the United States to sue fellow states, for two reasons. First, the United States could help police the obligations owed between two or more states. Second, each state wanted the United States to be able to enforce her neighbors' new commitments to the national government, and to prevent their interference with that government's own interests and institutions which, after all, purported to benefit the country as a whole. To these ends, each state granted the United States the authority to sue states, waiving its own immunity in a mutual covenant with its neighbors.

A qui tam suit under the FCA seeks to police mutually-incurred state obligations; one state's fraud imposes externalities on other states by redirecting funds to itself that were meant to benefit the entire country, essentially making maintenance of the national government more costly for law-abiding states. The suit also implicates a core proprietary interest of the United States because it redresses an injury to the federal treasury. Thus the sovereign and proprietary interests underlying this qui tam suit match those that historically motivated the US/p waiver.

Moreover, suits by individuals seeking to vindicate their own personal legal interests are often said to threaten the states' dignitary interests. See *Alden*, 119 S.Ct. at 2247 ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."). Suits by the United States, however, "as the sovereign which the Constitution creates," *Monaco*, 292 U.S. at 330, do not similarly threaten such interests. Where the United States is the real plaintiff in interest, the suit has the backing of the superior sovereign and thus the state-dignity rationale for immunity holds no sway.¹⁰

¹⁰ Petitioner's reliance on *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 n.12 (1984), see Petr. Br. at 46, is misplaced. As made clear in the sentence following the one Petitioner quotes, this Court

C. The United States Does Not Forfeit Its Sovereign Status For Purposes Of Immunity Doctrine By Authorizing A Private Person Rather Than Public Official to Advance Its Interests In Litigation

Petitioner Vermont maintains that the United States essentially forfeited its sovereign status by choosing a private rather than public champion of its interests. Notwithstanding Petitioner's protest, Petr. Br. 39-45, the mere fact that qui tam suits involve a private plaintiff in some sense cannot, without more, bar the suit; immunity doctrine does not track a bright-line distinction between public and private litigants.¹¹

declared that the United States' intervention to seek injunctive relief does not affect the Eleventh Amendment's bar of a private suit seeking damages to redress a purely personal injury. Here, however, the private relator is statutorily authorized to vindicate the interests of the United States, not her own, and she seeks damages for the primary benefit of the United States, not herself.

¹¹ The basic immunity principle protects a state defendant from suit by any governmental entity or private person. See, e.g., *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (the Court has "rejected the contention that sovereign immunity only restricts suits by individuals against sovereigns, not by sovereigns against sovereigns"). And waiver doctrine also fails to track a public/private distinction. This Court has held that the states waived their immunity for suits by some governmental plaintiffs but not others, see, e.g., *Monaco*, 292 U.S. 313 (immunity waiver encompasses suits by the United States or a sister state but not a foreign state), and for suits by some private plaintiffs but not others, see, e.g., *McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18 (1990) (states waived their immunity from Supreme Court appellate jurisdiction over all federal claims brought by private individuals); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (states waived their immunity from private suits pursuant to valid congressional statutes enforcing the Fourteenth Amendment); *Reich v. Collins*, 513 U.S. 106 (1994) (where a state promises a postdeprivation remedy for taxes collected in violation of federal law, due process requires the state to provide a state judicial forum in which such remedy may be sought). The fact that qui tam litigation superficially resembles a private suit merely asks rather than answers the relevant question: whether the

Echoing Judge Weinstein's dissent below, see 162 F.2d at 225-29, Petitioner argues that contemporary values of "process federalism" dictate that the states' immunity waiver extends only to suits prosecuted by an executive branch official.¹² The claim underlying this proposed "executive form" requirement is that vesting prosecutorial discretion solely in executive branch officials will provide an additional procedural buffer against such suits, and thus preserve more breathing room for states. On its own terms, the argument rests on dubious empirical and normative premises.¹³ More significantly, however, the argument assumes a

framers envisioned a plan waiver for this form of litigation brought on the United States' behalf.

¹² Petr. Brief at 34-39. In *dicta*, this Court has mentioned such a possible limitation on the US/p waiver's scope. See *Blatchford*, 501 U.S. at 785 (noting "[t]he consent, 'inherent in the convention,' to suit by the United States — at the instance and under the control of responsible federal officers — is not consent to suit by anyone whom the United States might select"); *Alden*, 119 S.Ct. at 2267 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."). In neither *Blatchford* nor *Alden*, however, did this Court purport to justify equating suits by the United States and suits by federal officers. Moreover, the *Blatchford* comment is *dicta* because this Court held that Congress had not attempted to delegate the United States' exemption from state sovereign immunity from the plaintiff Indian tribes. *Blatchford*, 501 U.S. at 785-86. The *Alden* passage is *dicta* both because the private plaintiffs asserted only their own interests, not those of the United States, and because Congress did not purport to authorize private assertion of the United States' interests.

¹³ As an empirical matter, for example, it is unclear whether DOJ prosecutors on their own accord do, or could be lobbied to, take states' sovereignty concerns into account when exercising their prosecutorial discretion. Surely federal prosecutors consider national interests that might counsel against litigation, such as foreign policy issues; such interests are commonly and properly considered by prosecutors whose professional loyalty runs to their employer, the federal government. But federal prosecutors have no duty of loyalty to states *per se*, and thus it

methodological commitment — bowing to contemporary functionalist concerns — that this Court has elsewhere eschewed.

1. An Executive Form Requirement For United States Suits Would Run Counter To The Framers' Original Understanding

Petitioner's argument for an executive form requirement is flatly inconsistent with this Court's self-professedly originalist approach to interpreting the scope of the US/p waiver. As explained earlier, this Court has always viewed the framers as waiving states' sovereign immunity for certain categories of suit because of the nature of the interests being asserted, rather than the form of the litigation. Thus the US/p waiver applies whenever litigation on the United States' behalf asserts a true sovereign or proprietary interest, so long as the litigation form — whether old

seems dubious that they would refrain from initiating an otherwise promising suit out of concern for a state's sovereignty interests.

As a normative matter, one cannot persuasively argue that a raw reduction in the number of suits filed against states serves contemporary federalism values. Suits might interfere with states' "ability to govern in accordance with the will of their citizens," *Alden*, 119 S.Ct. at 2264, but this is merely a byproduct of the principle of federal supremacy; as this Court emphatically reaffirmed, "[t]he States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." *Id.* at 2266. Surely a state cannot complain that a suit to recover funds it defrauded from the federal treasury is an unwarranted interference with its control over its own treasury!

More generally, states cannot claim that principles of state sovereignty grant them an enforceable interest in a light litigation load. States could not persuasively protest a congressional decision to increase the budget and staff of DOJ's civil fraud division 100-fold or create a special division focusing exclusively on state fraud, nor could states protest a presidential proclamation that policing state fraud is the Department's highest priority — even though each of these decisions might dramatically increase suits against states for damages (more so than even the FCA's *qui tam* provisions). Thus, any objection to *qui tam* suits must focus on some attribute other than their quantity.

or novel, widespread or idiosyncratic — comports with all relevant constitutional requirements such that it lies within Congress's authority to employ.¹⁴

Indeed, deciding today that a constitutional mode of litigating the United States' interests no longer qualifies for the US/p waiver would be akin to the Court having decided in *McKesson* that the states' original waiver of immunity from Supreme Court appellate review was limited to the form of appellate review then envisioned and practiced. The *McKesson* Court did not tie the scope of the waiver to the original method of judicial nomination and confirmation (which was subsequently modified to the detriment of state control by the Seventeenth Amendment), or to the prevailing practice of "circuit-riding" (which arguably kept the Justices more in touch with regional and local interests), or any other aspect of judicial form. Instead, this Court straightforwardly applied the waiver to the function of Supreme Court review, in whatever form that review would eventually take.

But even if the US/p waiver is limited to those forms of litigation to which the states most likely would have consented at the founding, the qui tam form still qualifies. "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943). The American colonies and early states patterned much of their law enforcement efforts on this English convention.¹⁵ Because state governments

¹⁴ Every federal circuit court to have considered a constitutional challenge to the FCA's qui tam framework has rejected it. Moreover, no general constitutional challenge to the qui tam framework was raised below or is fairly encompassed within the grant of certiorari. For a general defense of the framework's constitutionality, see *Caminker*, *supra* note 3.

¹⁵ See, e.g., Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1406 (1988) ("The colonies and the states employed informers' statutes in a wide variety of

frequently authorized qui tam relators to pursue their own interests, it is difficult to deny that states would have expected the national government to do the same.

And this expectation would have been fulfilled: the First Congress enacted numerous qui tam statutes.¹⁶ Subsequent early

cases, including the enforcement of regulatory statutes and morals legislation."); *id.* at 1406-07 & nn. 189-91 (providing examples of state qui tam statutes); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 Yale L.J. 816, 825-27 (1969) (highlighting early history of qui tam actions in pre- and post-revolutionary America); Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U.L. Rev. 275, 296-303 (1989) (observing that the early American employment of qui tam actions was designed to supplement public criminal law enforcement); Note, *supra* note 5, at 94: ("There are, however, numerous examples of statutory qui tam in early American history. Many colonies expressly adopted in toto certain English statutes which could be enforced by qui tam procedures. In addition, other statutes were adopted with minor modifications. Moreover, American legislatures did use qui tam provisions similar to those found in English statutes."); *id.* at 95 ("Statutes providing for qui tam suits were common in eighteenth century America.").

¹⁶ The First Congress employed qui tam actions in various forms and contexts. Six statutes imposed penalties and/or forfeitures for conduct injurious to the general public and expressly authorized suits by private informers, with the recovery being shared between the informer and the United States. Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (marshals' misfeasance in census-taking); Act of July 5, 1790, ch. 25, § 1, 1 Stat. 129 (same); Act of July 20, 1790, ch. 29, § 4, 1 Stat. 131, 133 (harboring runaway mariners); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (unlicensed Indian trade); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195-96 (unlawful trades or loans by Bank of United States subscribers); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (avoidance of liquor import duties).

Three statutes similarly imposing penalties and/or forfeitures for conduct injurious to the general public authorized informers bringing successful prosecutions to keep the entire recovery. Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 44-45 (import duty collectors' failure to post accurate rates); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (failure to

Congresses continued to expand qui tam authorization,¹⁷ and as late as the turn of this century, this Court acknowledged that the "right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer." *Marvin v. Trout*, 199 U.S. 212, 225 (1905). This "early congressional practice" more than "provides 'contemporaneous and weighty evidence of the Constitution's meaning'" thus confirming the constitutionality of the enforcement regime in general. *Alden*, 119 S.Ct. at 2261 (citation omitted). It also makes clear that states would have assumed their immunity waiver for suits by

register vessels properly); Act of Aug. 4, 1790, ch. 35, § 55, 1 Stat. 145, 173 (import duty collectors' failure to post accurate rates).

Two other qui tam statutes imposed penalties and/or forfeitures for conduct injurious both to the general public and more concretely to a subclass thereof. One allowed any person to sue, Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131, 131 (failure of vessel commander to contract with mariners); and the other allowed suits by anyone whose private rights were violated, Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25 (copyright infringement).

Congress conferred federal jurisdiction over qui tam actions in the first Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (authorizing federal district jurisdiction "of all suits for penalties and forfeitures incurred, under the laws of the United States").

¹⁷ See, e.g., Act of Mar. 22, 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (an act to prohibit slave trading from the United States to any foreign country); Act of May 8, 1792, ch. 36, § 5, 1 Stat. 275, 277 (providing rules for awarding costs in cases brought by "any informer or plaintiff on a penal statute to whose benefit the penalty or any part thereof if recovered is directed by law"). Professor Harold Krent has reported that "[w]ithin the first decade after the Constitution was ratified, Congress enacted approximately ten qui tam provisions authorizing individuals to sue under criminal statutes." *Krent*, *supra* note 15, at 296. He noted that this "number is particularly significant given the relative paucity of criminal provisions passed by Congress." *Id.* at 296 n.104. See *Adams, qui tam*, v. *Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [by qui tam plaintiffs] as well as by information [by the public prosecutor]").

the United States would have encompassed qui tam suits on the United States' behalf.

Moreover, any requirement that United States-against-states suit be controlled by politically accountable officials would be foreign to the framers' experience and expectations. The founding generation evidenced little if any concern that prosecutors be politically accountable to any centralized federal authority. Due to a lack of hierarchical organization, federal District Attorneys were quite isolated from one another; for all practical purposes, they were not meaningfully accountable to the President, the Attorney General, or any other high-ranking executive officer.¹⁸ Furthermore, the enforcement regime was heavily reliant on supplementation by private counsel, even putting qui tam relators aside.¹⁹

¹⁸ See, e.g., Leonard D. White, *THE FEDERALISTS* 406, 408 (1948) (federal district attorneys were subject to the supervision of the Secretary of State rather than the Attorney General, and they "apparently received no standard instructions, nor did they render annual or other regular reports. Apart from cases of exceptional importance and difficulty, they operated largely on their own responsibility."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 16 (1994) (the Judiciary Act of 1789 "created district attorneys who prosecuted suits on behalf of the United States in the district courts. Until 1861, however, these district attorneys did not report to the Attorney General, and were not in any clear way answerable to him. Before 1861, the district attorneys reported either directly to no one (1789 to 1820) or to the Secretary of the Treasury (1820 through 1861). Throughout this period, they operated without any clear organizational structure or hierarchy."); Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 Yale L.J. 1069, 1085 (1990) ("[C]ontacts between the district attorneys and the Department of State were 'largely fortuitous.' In general, the district attorneys conducted prosecutions for federal officials on a fee basis.") (citation omitted).

¹⁹ See, e.g., Lincoln Caplan, *THE TENTH JUSTICE* 4-5 (1987) (DOJ's creation reflected growing dissatisfaction with having private attorneys handle the public's cases); Dangel, *supra* note 18, at 1083 ("Federal departments and local officers routinely resorted to hiring private attorneys as 'special counsel' to prosecute government cases.").

This patchwork pattern of law enforcement belies the claim that the framers placed a high priority on the political accountability of public prosecution.²⁰

From an originalist perspective, it is clear that the framers would have contemplated federal qui tam actions against states, given their prevalence during the founding and immediate endorsement by Congress. And it is equally clear that the framers

²⁰ See Lessig & Sunstein, *supra* note 18, at 19-20 ("[F]ederal prosecutorial authority was also granted to private individuals wholly outside the executive's control. Both through citizen access to federal grand juries, and through civil qui tam actions (treated for at least some purposes as criminal actions), citizens retained the power to decide whether and in what manner to prosecute for violations of federal law."); Daniel N. Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 Albany L. Rev. 49, 58 (1988) ("In the period after the framing of the Constitution, therefore, federal law enforcement powers were dispersed among private individuals, state officials, and largely independent United States district attorneys.").

For several reasons, one cannot persuasively argue that states might have assumed that they would be party defendants only in the Supreme Court's original jurisdiction, and that an executive branch official would be responsible for litigating cases in that court even if no others. First, neither Article III nor the Judiciary Act of 1789 provided textual authority for this Court's exercise of original jurisdiction in a dispute between the United States and a member state; such jurisdiction was not statutorily granted until 1948, well after the decision in *United States v. Texas*, 143 U.S. 621 (1892), holding that sovereign immunity did not preclude a suit by the United States against a state. Second, states could not fairly assume any original Supreme Court jurisdiction would be exclusive of (rather than concurrent with) original lower court jurisdiction, where they would have expected the United States to be represented by relators, private counsel, and independent district attorneys. See *Ames v. Kansas*, 111 U.S. 449, 469 (1884) (Congress may render Court's original jurisdiction concurrent rather than exclusive). Most significantly, qui tam actions to enforce federal statutory directives would necessarily present federal claims, and the Court's original jurisdiction was understood as being limited to suits that fell within Article III jurisdiction only because a state was a party, and not for any other reason. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393-94, 398 (1821).

would not have insisted upon state suability only by centrally organized and politically accountable officials, an organizational pattern that was simply absent at the founding and that only emerged slowly and sporadically over a period of fourscore years. To embrace an executive form requirement on process value grounds, this Court would have to break sharply from its proclaimed commitment to reconstructing the framers' original understanding of state suability — precisely what it refused to do in either *Seminole Tribe* or *Alden*.²¹

2. The False Claims Act's Provisions for DOJ Oversight and Takeover Satisfy Any Reasonable Executive Form Requirement

Even if this Court chose to graft a modern executive form requirement onto US/p waiver doctrine, the fact that the FCA provides DOJ with ample means to monitor and take over privately-initiated litigation against states should suffice to satisfy any reasonable constitutional standard. The Court in *Alden* expressed concern over the lack of political accountability occasioned by a "broad delegation" of litigation authority to private persons. *Alden*, 119 S.Ct. at 2267 (emphasis added). But the Act's delegation of authority to qui tam plaintiffs is significantly circumscribed.

Indeed, compared to its founding-era precursors, the FCA affords executive officials an unprecedented degree of oversight and control over qui tam litigation. At time of the founding, if a private relator filed a qui tam action first she acquired exclusive control over the suit, and public prosecutors were entirely excluded from involvement.²² By contrast, the modern Act

²¹ In *Alden*, for example, this Court felt it unnecessary to respond to the dissent's claim that "past practice, even if unbroken, provides no basis for demanding preservation when the conditions on which the practice depended have changed in a constitutionally relevant way." 119 S.Ct. at 2290 (Souter, J., dissenting).

²² See, e.g., *United States v. Griswold*, 24 F. 361, 364 (D. Ore. 1885) (at common law, an action initiated by a qui tam plaintiff remained

provides public officials with significant avenues for oversight and supervision. After a qui tam plaintiff files an action, she must give the United States the opportunity to intervene and take control of the action. The Act requires that the complaint filed by a qui tam plaintiff (or "relator") be kept under seal, without service on the defendant for at least sixty days, *Id.* §§ 3730(b)(2), (3), and that the government be provided with a copy of the complaint and "written disclosure of substantially all material evidence and information the person possesses" in order to permit the government to decide whether to intervene at the outset. *Id.* § 3720(b)(2). DOJ thus has sixty days (or more, with court consent) in which to conduct a "diligent" investigation of the qui tam plaintiff's allegations and decide whether to enter and direct the litigation. *Id.* § 3730(a), (b)(2)-(4).

If DOJ elects to intervene, it takes control of the suit: "it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action," *Id.* § 3730(c)(1), though the qui tam plaintiff remains a party and may continue to participate in the litigation. *Id.*²³ The government has substantial authority to terminate the suit even over the qui tam relator's objection.²⁴

"exclusively under his control"); *Krent, supra* note 15, at 302 (noting that the government historically had no authority to intervene in a privately-initiated qui tam action).

²³ DOJ may seek a court order restricting the relator's participation upon a showing that unfettered participation would "interfere with or unduly delay the government's prosecution of the case, or would be repetitious, irrelevant, or for the purposes of harassment." *Id.* § 3730(c)(2)(C).

²⁴ The qui tam plaintiff is entitled to notice and a hearing prior to dismissal, 31 U.S.C. § 3730(c)(2)(A), so as to prevent DOJ from "drop[ping] the false claims case without legitimate reason." S. Rep. No. 345, 99th Cong., 2d Sess. 26, reprinted in 1986 U.S.C.A.N. 5266. DOJ may settle the case over the qui tam plaintiff's objections if the court determines after a hearing that the settlement is "fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B).

Alternatively, DOJ may leave the primary responsibility for directing the litigation to the qui tam plaintiff and monitor her progress and performance. *Id.* § 3730(c)(3). DOJ must consent prior to any dismissal of the action. *Id.* § 3730(b)(1). And DOJ may change its mind and intervene at any later date, upon a showing of good cause, to assume a more significant role in the litigation. *Id.* § 3730(c)(3).²⁵

Through these various avenues, public officials can still consider and protect the state's abstract or tangible interests in avoiding liability, and they can still be responsive to direct political pressure from state officials, or any indirect pressure from the state's congressional representatives. One might even view a decision by DOJ not to exercise its authority to take over the litigation as a voluntary and politically accountable relinquishment of its enforcement power to enable a specific individual (and her counsel) to advocate the interests of the United States. Therefore, even if some measure of executive prosecutorial discretion were deemed necessary to secure important process values, the oversight role provided DOJ in the False Claims Act would satisfy this requirement.

Accordingly, a qui tam suit raises no constitutional concerns under the Eleventh Amendment or associated principles of state sovereign immunity.

II. STATES ARE "PERSONS" SUBJECT TO LIABILITY WITHIN THE MEANING OF THE FALSE CLAIMS ACT

At its core, the False Claims Act authorizes suits by the DOJ against "[a]ny person" who, among other things, knowingly submits false claims or false statements in support of false claims to the Federal Government. 31 U.S.C. § 3729(a)(1) and (2). Any holding that states are not "persons" for purposes of the FCA

²⁵ To monitor the litigation prior to an intervention decision, DOJ may request that it be served with copies of all pleadings filed, and copies of all deposition transcripts. *Id.*

would prevent not merely individual enforcement actions against states under this provision, but also suits against states by the United States. Such a holding would be untenable and would disable the Federal Government from enforcing an important anti-fraud provision (meant by Congress to be all-encompassing) against a prime category of recipients of federal aid.

A. The Purposes of the FCA Require That States Be Deemed to Qualify as "Persons" Subject to Liability

States receive a massive and increasing amount of federal aid. Federal grants to state and local government more than doubled from \$108 billion in 1987 to \$228 billion in 1996. *See* Bureau of the Census, U.S. Department of Commerce, Publication FES/96, Federal Expenditures by State for Fiscal Year 1996 at 46, Table 11 (1997). For fiscal year 1998 (October 1, 1997 to September 30, 1998), the amount rose to \$253 billion. Bureau of the Census, U.S. Department of Commerce, Federal Aid to States for Fiscal Year 1998.

State governments, as well as state universities, research facilities, hospitals, and political subdivisions, are thus in a position to commit substantial fraud against the United States. *See* David J. Cantelme, *Federal Grant Programs to State and Local Governments*, 25 Pub. L. Cont. L.J. 335, 335-36 (1996). The False Claims Act will not serve its intended purpose as an effective anti-fraud provision unless it is construed to subject states to liability. *See, e.g.,* John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 2-91 (1993) (states qualify as defendants because they are "major recipients of federal funds").

This Court has long held that fraud with respect to federal-state aid creates liability under the FCA. Half a century ago, this Court explained:

While at the time of passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately

10% of all federal money was distributed in this form. These funds are as much in need of protection from fraudulent claims as any other federal money. . . . The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those who would "cheat the United States."

United States ex rel. Marcus v. Hess, 317 U.S. 537, 544 (1943). The need to include states as defendants potentially subject to liability under the FCA is even more urgent today.

The understanding shared by Congress and the states that the False Claims Act includes states as "persons" subject to liability is mirrored by the history of the FCA. The Act has always been construed as a sweeping statute with narrowly confined exceptions carefully specified by Congress. "The original False Claims Act was passed in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War. Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 229, 232 (1968) (emphasis added).

An 1862 House Committee Report, in discussing various frauds committed during the Civil War, referred to certain state officials who had used war contracts for personal profit. *See* H.R. Rep. No. 2, 37th Cong., 2d Sess. at xxxviii-xxxix (1862). It is difficult to suppose that Congress had forgotten the results of this extensive investigation when it passed the False Claims Act the next year.²⁶

²⁶ To be sure, states have not been sued as defendants with great frequency under the FCA. But the lack of frequency is attributable not to any considered view that the statute excludes states from liability but rather to a combination of two factors: the fact that many federal-state grant programs are of relatively recent vintage and the fact that the FCA was historically an under-utilized statute (a flaw which Congress sought to remedy in the 1986 amendments).

B. The Text of the FCA Provides that States Are "Persons" Subject to Liability

"Whether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment," including "the subject matter [of the statute], the context, the legislative history, and the executive interpretation." *Sims v. United States*, 359 U.S. 108, 112 (1959); see also *United States v. Cooper*, 312 U.S. 600, 605 (1941). Thus, this Court has frequently held, as an ordinary matter of statutory interpretation, that the term "person" in a federal statute includes a state — even where Congress did not expressly define the term.²⁷

²⁷ See, e.g., *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 205-07 (1991) (state is a "person" for purposes of federal railroad regulation); *Plumbers' Union v. Door County*, 359 U.S. 354, 359 (1959) ("This Court has held many times that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law."); *California v. United States*, 320 U.S. 577, 585 (1944) (state held subject to Shipping Act); *Georgia v. Evans*, 316 U.S. 159, 161 (1942) (state is a "person" entitled to bring antitrust action under Sherman Act); *United States v. California*, 297 U.S. 175, 186 (1936) (state-run railroads subject to Federal Safety Appliance Act because it would be a mistake to exclude the states from an "act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action"); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 91-92 (1934) ("It has been held many times that the United States or a state is a 'person' within the meaning of statutory provisions applying only to 'persons.'"); *Ohio v. Helvering*, 292 U.S. 360, 370 (1934) (holding that states engaged in sale of liquor were "persons" subject to federal liquor tax: "A state is a person within the meaning of a statute punishing the false making or fraudulent alteration of a public record 'with intent that any person may be defrauded.' Under a statute defining a negotiable note as a note made by one person whereby he promises to pay money to another person, and providing that the word 'person' should be construed to extend to every corporation capable by law of making contracts, it was held that the word included a state. And a state is a person or a corporation within the purview of the priority provisions of the Bankruptcy Act.") (citations omitted).

For several reasons, it is clear that the FCA — as initially enacted in 1863 and certainly as strengthened in 1986 — includes states as "persons" subject to liability.

1. The 1986 CID Provisions Make Clear that a State is a "Person" Under the FCA

Congress did not expressly define "person" in the liability section of the FCA. But the term is defined in the Civil Investigative Demands (CID) section of the Act, 31 U.S.C. § 3733, which Congress added in 1986. The CID provision authorizes as part of a "false claims law investigation" the service of CIDs on "person[s]." It defines "false claims law investigation" as "any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law." 31 U.S.C. § 3733(l)(2) (emphasis added). The CID provision of the FCA expressly defines "person" as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." *Id.* § 3733(l)(4).²⁸

The CID provision unmistakably demonstrates that a state is one of the "persons" subject to liability under the FCA. The CID provision is not limited (as some have suggested) to the issue of third-party discovery from innocent bystanders who are not themselves subject to FCA liability. Rather, a "false claims law investigation" is defined as an inquiry into "whether any person" — which the CID provision defines to include a state — "is or has been engaged in any violation of a false claims law." *Id.*

²⁸ Petitioner contends that, if the term "person" as used in the FCA already included the states, this added definition would have been unnecessary. *Petr. Br.* at 20. But the added definition also makes clear that natural persons, corporations, and other entities are "persons" for purposes of the CID section of the Act; surely Petitioner cannot suggest that natural persons and corporations are outside the scope of the FCA! In short, it is obvious that in the CID section Congress was restating, rather than modifying, the definition of "persons" for purposes of the FCA.

§ 3733(a)(1)(B)(2). Any such "person" is subject to a lesser fine under the FCA if it cooperates with the federal investigation. *Id.* § 3729(a). Section 3733 demonstrates that a state may be a target of a "false claims law investigation" — and thus that a state may be a potential defendant subject to liability under the FCA.

It would be absurd to contend that states, defined as "persons" under § 3733, could be the targets of "false claims law investigations," but that states could not qualify as "persons" liable for any violations under § 3729. It would not make sense for Congress to use the identical term in two different parts of the same statute, intend two different meanings for the term, but only explicitly set out one of the two differing definitions. To the contrary, "identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996).

In fact, the FCA contains only four specific exclusions from the broad class of "persons" who may be defendants under the Act: Members of Congress, members of the Judiciary, certain senior executive branch officials, and members of the armed forces under certain circumstances. 31 U.S.C. § 3730(e). Hence, Congress considered the types of potential defendants that should be excluded from the FCA but chose not to exclude states from the Act's scope.

2. The History of the 1986 Amendments Confirms That a State is a "Person" Under the FCA

The history of the 1986 amendments to the FCA confirms Congress's understanding that states had always qualified as "persons" subject to liability under the statute. The Senate Report stated that "[t]he False Claims Act reaches all parties who may submit false claims. The term 'persons' is used in its broad sense to include partnerships, associations, and corporations — as well as States and political subdivisions thereof." S. Rep. No. 345, 99th Cong., 1st Sess. 8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273 (emphasis added). To clarify and underscore the breadth of the category of defendants subject to liability under the FCA,

Congress in 1986 amended § 3729 to extend liability to "[a]ny person."²⁹

Whatever its utility in other contexts,³⁰ such unmistakable legislative history should be accorded significant weight in the context of federal-state relations. The prominent statement in the 1986 Committee Report was adopted in the context of an amendment to § 3729 and put the states on notice that they were subject to liability under the FCA. The statement thereby enabled the political safeguards of federalism, see *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 552-54 (1985), to function properly.

3. The States Have Long Understood that They Are "Persons" Under the FCA

Indeed, the states themselves have long understood that they are "persons" entitled to sue under the FCA. States have often brought suit as relators. See, e.g., *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 650 (D.C. Cir. 1994); *United States ex rel. Woodward & State of Colorado v. County View Ctr., Inc.*, 797 F.2d 888 (10th Cir. 1986); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *United States ex rel.*

²⁹ The previous version of § 3729 applied to "a person not a member of an armed forces . . .," 31 U.S.C. § 3729 (1982), which — while inartful — nonetheless included states, corporations, and other artificial persons and legal entities. See, e.g., *United States ex rel. Woodward & State of Colorado v. Country View Care Ctr., Inc.*, 797 F.2d 888 (10th Cir. 1986) (applying FCA to corporate defendant). Any suggestion that the pre-1986 version of § 3729 was limited to natural persons would be untenable.

³⁰ See *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("[W]e have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation'" (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969))).

Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624 (N.D. Ill. 1992).

Yet the same term — “person” — defines who may sue and who may be sued under the FCA; indeed, the term “person” is used interchangeably throughout the statute to describe both parties. Compare § 3729, § 3730(a), and § 3730(b). It is inconsistent for states to maintain that they are not “persons” for purposes of § 3729 when they have long availed themselves of the benefits of the statute by asserting that they are “persons” for purposes of § 3730(b).

Moreover, a 1986 amendment confirmed state authority to bring suit under the FCA by conferring jurisdiction on the district courts “over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as [a qui tam suit] brought under Section 3730.” 31 U.S.C. § 3732(b). This provision, enacted at the behest of the National Association of Attorneys General, was intended to allow “State and local governments to join State law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence.” S. Rep. No. 345, 99th Cong., 2d Sess. 16 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5281; see also *id.* at 12-13, reprinted in 1986 U.S.C.C.A.N. at 5277-78 (disapproving *Dean* decision on unrelated jurisdictional grounds but not questioning Wisconsin’s ability to be qui tam plaintiff). By its terms, § 3732(b) is not limited to allowing states to intervene to assert their “related” state-law claims, it also permits them to assert FCA claims in federal district court. In fact, because states are forbidden by 31 U.S.C. § 3730(b)(5) from intervening in FCA suits brought by private plaintiffs³¹ the provision conferring

³¹ Section 3730(b)(5) provides that “when a person brings an action under this subsection no person other than the [Federal] Government may intervene or bring a related action based on the facts underlying the pending action.”

jurisdiction over a state’s related claim under state law would be meaningless unless states could be qui tam relators.

C. The “Plain Statement Rule” Is Inapplicable

Because the FCA authorizes suits against the states by the United States (and not simply by private persons), the “plain statement” rule of such decisions as *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), does not apply. “[T]he Constitution presents no barrier to lawsuits brought by the United States against a State. For purposes of such lawsuits, States are naturally just like ‘any nongovernmental entity’; there are no special rules dictating when they may be sued by the Federal Government, nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits.” *Pennsylvania v. Union Gas Co.*, 499 U.S. 1, 11 (1989), *overruled on other grounds*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Indeed, the United States may sue a state “with or without specific authorization from Congress.” *United States v. Mississippi*, 380 U.S. 128, 140 (1965); see also *United States v. California*, 332 U.S. 19, 26-28 (1947) (no explicit statutory authorization is necessary before the Federal Government may sue a state).

Indeed, if anything, state liability under the False Claims Act preserves the essential balance of federalism. Such liability prevents an individual state from imposing externalities on its neighbors, by siphoning to itself federal funds intended for the benefit of the entire nation. By deterring as well as remedying state fraud, the FCA works to preserve the proper balance of federalism by reducing the ability of a state wrongfully to divert benefits to itself or to impose unjustified costs on sister states. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428-29 (1819) (state tax on the national bank raised federalism concerns because the tax siphoned into Maryland’s coffers federal funds intended to benefit all of the other states). The False Claims Act thus operates as a Union-reinforcing measure which reflects the same basic anti-discrimination and anti-protectionism principles as — for

example — the dormant Interstate, Foreign, and Indian Commerce Clauses.

Will and *Gregory* are inapposite. Those cases involved suits by private parties (not the United States) against a state. Implicit in each case was the notion that suits by private parties would alter the usual constitutional balance between the states and the federal government. In the case at bar, by contrast, there is no such alteration of the usual constitutional balance because the United States has unquestioned authority to sue the states. See Part I, *supra*.

In *Will*, for example, this Court held that a private party could not bring suit against a state agency in state court under 42 U.S.C. § 1983 because Congress had not abrogated the states' sovereign immunity in their own courts by enacting § 1983 as the Civil Rights Act of 1871. This Court explained that "[t]he doctrine of sovereign immunity was a familiar doctrine at common law. The principle is elementary that a State cannot be sued in its own courts without its consent. We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent." 491 U.S. at 57-58. States have no corresponding immunity from suit by the United States.

In *Gregory*, this Court applied a "plain statement" rule only after concluding that application of the federal Age Discrimination in Employment Act to displace a Missouri state constitutional provision requiring state judges at a specified age would intrude upon a state's ability to structure its own form of government — a privilege reserved to the states by the Tenth Amendment. 501 U.S. at 460-64. By contrast, the application of the False Claims Act to prevent states, along with private corporations, researchers, universities, and others, from defrauding the federal government manifestly does not intrude upon any core governmental function. The states have no right or authority, traditional or otherwise, to engage in fraudulent conduct, wholly apart from whether such tortious activity is actionable under the FCA. See *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 554 (1985) ("[N]othing in the overtime and minimum-wage requirements of

the FLSA . . . is destructive of state sovereignty . . . [because the state entity] faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.").

Nor does the process by which a state receives federal funds resemble an essential state function. The state is in the position of a supplicant coming to the federal sovereign. "There is no coercion in subjecting states to the same conditions for federal funding as other grantees: States may avoid these requirements simply by declining to apply for and to accept these funds. But if they take the King's shilling, they take it cum onere." *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870, 873 (8th Cir. 1998) (Arnold, C.J.). Thus, in *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127 (1947), this Court rejected a Tenth Amendment challenge to the application of the Hatch Act to the political activities of federally funded state employees, opining that the state could "follow the 'simple expedient' of not yielding to what she urges is federal coercion." *Id.* 143-44. See also *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

In *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 205-07 (1991), this Court held that the clear statement rule is a matter of statutory construction, not constitutional law, and that application of the rule would be inappropriate where it would frustrate congressional expectations. The same reasoning should govern here. See also *Alden v. Maine*, 119 S. Ct. 2240, 2258 (1999) (*Hilton* premised on the view that "[c]losing the door to FELA suits against state employers would have dislodged settled expectations and required an extensive legislative response").

Nor is the plain statement rule triggered by the treble damages provision of the FCA. See Petr. Br. 20-21. This Court has repeatedly held that the FCA is remedial in nature.³²

³² The pre-1986 version of the FCA provided for double damages and penalties, yet this Court held that it was a remedial rather than punitive statute. See *United States v. Halper*, 490 U.S. 435, 449 (1988) (FCA's damages provision represents "rough remedial justice" as long as rational

In any event, even if the "plain statement" rule were applied in this case, it would be satisfied, for the reasons previously explained. Accordingly, this Court should hold that states are "persons" subject to liability under the FCA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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relation exists between the government's loss and the damages imposed); *United States v. Bornstein*, 423 U.S. 303, 314-15 (1976) ("Congress intended the double-damages provision to play an important role in compensating the United States in cases where it has been defrauded," and the provision serves a "make-whole" function); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943) ("the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. . . . The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress."). The 1986 amendments did not transform the statute from a remedial to a punitive one. See S. Rep. No. 99-345, at 7 (the Committee clarified that knowing standard did not require actual knowledge of fraud or specific intent to commit the fraud). The change from a double damages remedy to treble damages reflects Congress' judgment as to what constitutes "rough procedural justice." *Halper*, 490 U.S. at 449.